Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1977

Publication of this Document Approved by Alfred C. Holland, State Purchasing Agent.
500-11-78-150606 Estimated Cost Per Copy $3.84

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The Commonwealth of Massachusetts

Boston, February 1, 1979

To the Honorable Senate and House of Representatives:

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1977.

Respectfully Submitted,
FRANCIS X. BELLOTTI
Attorney General

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
FRANCIS X. BELLOTTI

First Assistant Attorney General
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Thomas R. Kiley[16]

Assistant Attorneys General

Jose R. Allen[6]
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Nicholas P. Arenella
Kenneth M. Barna[27]
Charles Barry[20]
Michael Joseph Barry[11]
W. Channing Beucler
Robert Bohn[3]
Margo Botsford
Jonathan Brant
Laurie Burt[7]
James A. Clayton Jr.[24]
Robert D. Cohan
Garrick F. Cole
John P. Corbett
Charles C. Corkin II
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Kathleen Ryan Dacey
Stephen R. Delinsky[13]
Ernest P. DeSimone[2]
Maureen Dewan
Paul Donaher
Michael C. Donahue
Eleanor A. Dwyer
Irene D. Emerson[8]
Catherine Farrell[32]
Lisa Fitzgerald
James A. Fox[4]
Gloria A. Fry[18]
Carol Fubini[20]
Charles P. Gamer
Frank A. Gaynor[7]
Brian F. Gilligan
Paula Gold
Joseph P. Gordon Jr.
Robert V. Greco
William F. Green
Steven J. Greenfogel
Richard A. Gross
Patricia C. Gunn[21]
Catherine W. Hantzis[5]
L. Scott Harshbarger
Paul D. Hodge[19]
William E. Howell
John F. Hurley
John J. Irwin[23]
Daniel P. Jaffe[15]
Paul Johnson[15]
Carolyn A. Kelliher
Sally A. Kelly[10]
Kevin Kirrane
Timothy J. Lang Jr[24]
Steven M. Leonard
William F. Linnehan
Bernard Manning
Michael J. McCormack
Andrew McElaney
Denzil D. McKenzie
Leo S. McNamara
Barton J. Menitove
Michael B. Meyer
Thomas H. Miller
Anton T. Moehrke
John T. Montgomery
Paul J. Muello[5]
Claudia Noack[33]
Henry F. O'Connell Jr.
Terence P. O'Malley
Kathleen K. Parker
Steven T. Platten[18]
Alan K. Posner
Mary J. Reedy[1]
Louis A. Rizoli
Paula Rosen[35]
Steven A. Rusconi
Robert Rodophele
S. Stephen Rosenfeld
Barbara J. Rouse
Anthony P. Sager
Stephen Schultz
Marc S. Seigle
Terry Seligman
Paul W. Shaw
David M. Siegel[11]
Mitchell Sikora
Bernistine Singley-Battle[28]
Susan K. Sloane
Barbara A. Smith
Deborah S. Soloman[26]
Piroska Soos
Johnathan Souweine[13]
Timothy Spillane[9]
Donald Stern
Kevin Suffern[14]
Paul J. Swartz[22]
Terence M. Troyer
Frank Upham[27]
John J. Ward

Betty Waxman
Ellyn R. Weiss
Catherine A. White
Howard Whitehead[31]
Estelle Wing[17]
Timothy J. W. Wise
Donald P. Zerendow
Stephen Zeidman

Assistant Attorney General; Director, Division of Public Charities

Francis V. Hanify[34]
Susan K. Sloane

Assistant Attorneys General Assigned to Department of Public Works

Michael James Barry[1]
Elizabeth A. Bowen
Edward J. Clancey Jr.[1]
Paul A. Good
Allan Gottlieb
James J. Haroulos
Leslie Hedgebeth[14]
F. Timothy Hegarty Jr.[8]
Edward J. McCormack III[29]
William A. Mitchell[12]
Robert Mulligan
Howard Palmer
Joseph A. Pelligrino
Edward J. Quinlan
Richard Rafferty
T. David Raftery
John W. Spencer
John T. Twomey
Christopher H. Worthington

Assistant Attornetys General Assigned to the Division of Employment Security

Joseph S. Ayoub
William D. Jackson[25]
George J. Mahanna[9]
Frank J. Scharaffa

Chief Clerk

Russell F. Landrigan[36]
Edward J. White[11]

Assistant Chief Clerk

Leo J. Cushing[11]

1 Appointed June 1, 1976
2 Appointed June 28, 1976
3 Appointed July 1, 1976
4 Appointed August 30, 1976
5 Appointed September 7, 1976
6 Appointed September 8, 1976
7 Appointed September 20, 1976
8 Appointed October 12, 1976
9 Appointed November 1, 1976
10 Appointed December 13, 1976
11 Appointed January 3, 1977
12 Appointed January 31, 1977
13 Appointed February 1, 1977
14 Appointed February 22, 1977
15 Appointed March 1, 1977
16 Appointed March 7, 1977
17 Appointed March 14, 1977
18 Appointed March 28, 1977
19 Appointed April 19, 1977
20 Appointed June 7, 1977
21 Resigned July 12, 1976
22 Resigned August 6, 1976
23 Resigned September 10, 1976
24 Resigned October 1, 1976
25 Resigned November 1, 1976
26 Resigned November 19, 1976
27 Resigned December 31, 1976
28 Resigned February 18, 1977
29 Resigned February 25, 1977
30 Resigned March 4, 1977
31 Resigned May 20, 1977
32 Resigned May 24, 1977
33 Resigned May 27, 1977
34 Resigned June 1, 1977
35 Resigned June 24, 1977
36 Retired December 31, 1976

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1977

Account Number	*Account Name*	*Appropriation*	*Expenditures*	*Advances*	*Encumbrances*	*Balance*
	STATE FUNDS					
0810-0001	Administration	$4,352,146.63	$4,144,147.23	$4,676.65	$111,920.16	$ 91,402.59
0810-0014	Public Utilities: Authorized by Ch.1224; 1973	250,000.00	209,790.90	—	33,610.61	6,598.49
0810-0100	LEAA Hard Cash Matching Funds	30,000.00	29,362.95	—	637.05	—
0821-0100	Settlement of Claims	250,000.00	247,457.54	—	2,542.46	—
0810-0201	Insurance; Authorized by Ch.226; 1976	120,000.00	51,629.06	—	68,003.74	367.20
0810-8871	Attorney General — Capital Outlay — Furnishings & Equipment Including Legal Documents for Law Library	210,000.00	44,060.17	—	20,564.00	145,375.83
		5,212,146.63	4,726,447.85	4,676.65	237,278.02	243,744.11
	FEDERAL FUNDS					
0810-6613	Consumer Protection Research and Pilot Program	7.78				7.78
0810-6619	Organized Crime Unit	536.50			536.50	
0810-6624	Organized Crime Unit	932.27				932.27
0810-6626	Appellate Legal Services	30,877.37	28,850.14			2,027.23
0810-6627	Organized Crime Unit	12,802.10	11,555.42			1,246.68
0810-6629	Commission on the Legal & Civil Rights of the Developmentally Disabled	1,185.87	1,160.81			25.06
0810-6630	Water Pollution Control Program	105,878.42	61,107.00			44,771.42
0810-6631	Air Pollution Control Program	53,678.99	40,419.47			13,259.52
0810-6632	Attorney General Law Library	19,214.44	19,195.39			19.05
0810-6633	Special Violent Crime Unit	25,995.63	25,995.63			
0810-6634	Organized Crime Unit	235,032.00	108,409 86	888.11	15,135.05	110,598.98
0810-6635	Special Violent Crime Unit	43,345.00	31,396.00		765.00	11,184.00
0810-6636	Criminal Appellate Service	18,920.00	13,995.16			4,924.84
	TOTAL FEDERAL FUNDS	$ 548,406.37	342,084.88	888.11	16,436.55	188,996.83
	GRAND TOTAL	$5,760,553.00	$5,068,532.73	$5,564.76	$253,714.57	$432,740.94

STATEMENT OF AGENCY TRUST FUND ACCOUNTS
JUNE 30, 1977

Account Number		*Total Available*	*Disbursements*	*Balance*
0810-6610	Attorney General Anti-Trust Settlements	$ 64,200.26		$64,200.26
0810-6701	Dexter Nursing Home	344.95		344.95
0810-6703	Miami Vacations Inc, d/b/a Resort Hotel Association	869.05		869.05
0810-6704	Framingham Civil Service School, Inc.	16.18		16.18
0810-6705	Dante Gregorie d/b/a United Auto Buyers	4,000.00		4,000.00
0810-6706	Joe Fiori's Auto Sales	800.00	800.00	0
0810-6708	Mass. Rentals, Inc, d/b/a City Wide Rentals	455.00	75.00	380.00
0810-6710	E & S Enterprises, Inc. d/b/a Belton Hearing Aid Service	3,000.00	2,965.00	35.00
0810-6712	C. Murphy, W. Hartwick, Bird Inc., Univ. Bank & Trust	162.49		162.49
0810-6713	Figure Reducing Salons Inc. d/b/a Lady Diane Figure Salon	1,081.00	1,081.00	0
0810-6714	Anthony Famalette d/b/a Westport Autorama	2,400.00	2,400.00	0
0810-6715	Julius Wilensky d/b/a Orleans Coal & Oil Co.	2,000.00	2,000.00	
0810-6716	Compact Auto, Inc.	550.00		550.00
0810-6717	Hamilton's Inc.	10,000.00	10,000.00	0
0810-6718	Taunton Sales, Inc.	800.00	800.00	0
0810-6719	Paul J. Woods Company	3,500.00		3,500.00
0810-6720	Paul Sheridan d/b/a Sherry Decorators	75.00		75.00
0810-6721	Wish Realty Associates, Inc.	1,000.00		1,000.00
0810-6722	General Investment & Development Co. d/b/a Windsor Meadows	829.00	829.00	0
0810-6723	Bluebird Acres Mobile-Homes Park, Inc. et al	5,100.00	5,100.00	0
0810-6724	Bluebird Realty Trust	6,772.00		6,772.00
0810-6725	Phillip G. Gallagher, M.D.	1,956.75		1,956.75
Total Funds in Agency Trust Accounts		$109,911.68	$26,050.00	$83,861.68

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
FOR FISCAL YEAR ENDED
JUNE 30, 1977

Account Number		
0801-40-01-40	Fees — Filing Reports; Charitable Organizations	$60,911.93
0801-40-02-40	Fees — Registration; Charitable Organizations	6,575.00
0801-40-03-40	Fees — Professional Fund Raising Council of Solicitor	120.00
0801-62-01-40	Reimbursement for Services — Cost of Civil Actions	3,500.00
0801-62-02-40	Reimbursement for Services — Cost of Investigations	3,100.00
0801-67-67-40	Reimburse Indirect Cost Allowable	21.23
0801-69-99-40	Miscellaneous	4,420.03
	TOTAL INCOME	$78,648.19

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Boston, February 1, 1979

To the Honorable Senate and House of Representatives:

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, I herewith submit my report.

This Annual Report is my third as Attorney General of the Commonwealth and covers the fiscal year from July 1, 1976 to June 30, 1977.

During the twelve-month period we continued our efforts to improve the administration of the office. Specifically, we adopted a personnel code, which contains a mechanism for classifying employees of the Department on the basis of merit, according to job title and pay grade. Adoption of the Code marked the culmination of our effort, which began with an independent Civil Service Management Survey, to achieve parity and equity in salaries throughout the Department. At the same time we adopted a Personnel Manual setting forth in writing the personnel policies and procedures of the Department. The adoption and implementation of the code and manual are evidence of our commitment not only to improve the administration of the office, but also of a desire to institutionalize the improvements and preserve them for future generations.

As in the past, Fiscal 1977 was also a significant year because we instituted innovative affirmative litigation programs to deal with the legal problems of the Commonwealth. During the period covered by this report we established an Antitrust Division, created specifically to enforce federal and state laws against price fixing and monopolization. The Division is funded by a grant from the United States Department of Justice, which recognizes the role Attorneys General play in the protection of the citizens of their respective states. Enforcement of the antitrust laws by this Department is a natural outgrowth of our aggressive work in the area of consumer protection. In the past we have encouraged dispute resolution at the local level while bringing consumer protection suits primarily against major violators who engage in patterns of deceptive practices. Price fixing may be the ultimate anti-consumer practice, costing the consumers of Massachusetts millions of dollars each year. The Antitrust Division has already begun the attack on the practice, filing several federal actions including a multi-million dollar suit against sugar refiners.

A second major new program was also created to begin to deal with Medicaid provider fraud. The federal government has identified provider fraud as a nationwide problem costing the taxpayers hundreds of millions of dollars annually. In Massachusetts, we created a Nursing Home Task Force patterned on a similar unit operating in New York state. The Task Force is a part of the Criminal Bureau. It utilizes a team approach, with attorneys, accountants and investigators working together to identify and prosecute the health care providers who violate state and federal law.

Through this pilot program we are attempting to demonstrate the State's ability to reduce provider fraud in one segment of the health care delivery system. When federal funds become available, we hope to expand the pilot project to cover the entire system.

Once again the Affirmative Litigation Division was particularly successful in advancing the interests of the Commonwealth. In one suit brought by the Division we prevented the federal government from discontinuing ten million dollars in medicaid funding, and in a second we succeeded in enjoining a major discontinuation in the federal food stamp program. The Civil Rights and Civil Liberties Division also commenced a series of affirmative cases of great significance, when they brought suit on behalf of women workers in the publishing industry who were allegedly victims of gender-based job discrimination. We filed yet another case of national importance when, with the Attorneys General of Illinois and New York, the Environmental Protection Division sued the Federal Aviation Administration seeking uniform nationwide noise pollution regulations.

It was an active year for the Criminal Bureau as well. Attorneys assigned to it commenced major investigative and prosecutorial efforts to combat arson for profit, the fastest growing crime in America. Similarly the Bureau began unravelling a major scandal connected with the administration of federal vocational education funds in the State Department of Education, and lawyers from the Bureau "raided" the Department of Corporations and Taxation and seized tax records as they commenced an investigation into allegations of favorable tax treatment for politically connected taxpayers. These three cases promise to produce significant prosecutions over the next two fiscal years.

Not all of the Department's work was as glamorous as the foregoing summary would suggest, but much of it was of equal long term importance. During the year the Government Bureau promulgated model rules for the conduct of adjudicatory hearings which should have a permanent impact on the way the State's Administrative Procedures Act is administered. Several important Opinions of the Attorney General, written in the Government Bureau, should also have a lasting effect.

In these areas I have highlighted, this was another year of true progress for the Department. It is impossible to reduce our accomplishments to two or three pages of introductory material. The extent of our efforts and accomplishments are set forth in more detail in the balance of this report.

I. CIVIL BUREAU

CONTRACTS DIVISION

The work of the Contracts Division is generally divided into three areas: (A) Litigation, (B) Advice and counsel to state agencies, and (C) Contract review.

A. *LITIGATION*

The Division represents state officers and agencies at all stages of litigation involving contracts.

Chapter 258 of the General Laws is, for the most part, the controlling statute. Essentially, it is mandatory that all actions against the Commonwealth be brought in Suffolk County if the amount claimed exceeds $2,000.00. The cases are tried without a jury and, almost universally, are referred to a Master for hearing.

At present, there are 298 active cases in the Division. Eight cases were closed out this year.

These cases involve state highway, building or public work construction claims. Most of these cases involve contract or specification interpretation and entail extensive preparation and investigation. Discovery, principally depositions and interrogatories, are mandated in all cases. Consultation with engineers and architects is routine in every instance. Trials are prolonged, not solely because of the complexity of issues, but also because of the fact that most cases involve at least three or four parties.

The general economic pricture has generated litigation in contesting the award of contracts, resulting in many more allegations of failure to meet public bidding requirements. There has been an increase in suits in which preliminary injunctive relief is sought.

The Contracts Division has intensified its opposition to the issuance of preliminary, or temporary, injunctive relief against the Commonwealth, its agencies and officers. The allowance of such relief would delay normal contract procedure and would result in increased costs.

To date, we have succeeded in defeating all attempts at securing injunctive relief.

B. *ADVICE AND COUNSEL TO STATE AGENCIES*

Every day, the Division receives requests for assistance from state agencies and officials. Their problems involve formation of contracts, performance of contracts, bidding procedures, bid protests, contract interpretation, and a myriad of other matters. Many of these agencies have no counsel or are subdivisions of Administration and Finance.

The economy has its effect on bids and bidding procedures in the State Purchasing Agent's office. All materials, supplies and equipment purchased by the state (except military and legislative) must be advertised, bid, and awarded by the Purchasing Agent. We receive, each week, new requests for assistance in purchasing matters. Economic conditions have heightened competition. Bid awards are bitterly contested. Members of the Division counsel the Purchasing Agent and his staff, interpret regulations, and attend informal protest hearings.

We also have an equivalent relationship with the Department of Public Works, Metropolitan District Commission, Bureau of Building Construction, Group Insurance Commission, Secretary of Transportation, Regional Community Colleges, Data Processing Bureau, Mental Health, Youth Services, Water Resources, etc.

C. *CONTRACT REVIEW*

We receive all state contracts, leases and bonds submitted to us by state agencies. During the fiscal year, we approved as to form a total of 2,453 such contracts. In many cases, 185 to be exact, we rejected the documents and approved them when the deficiencies were eliminated.

All contracts are logged in and out and a detailed record is kept. The monthly count for the fiscal year was:

July, 1976	411
August	302
September	226
October	180
November	175
December	149
January, 1977	143
February	121
March	135
April	175
May	213
June	223
	2,453

Contracts are assigned to the attorneys in rotation. The average contract is approved within forty-eight hours of its arrival in the Division.

The work of the Division in the preparation and trial of contract matters has been greatly facilitated by the addition to the staff of a professional engineer. His assistance in investigation and interpretation of contract documents and plans has been of considerable assistance to the trial attorneys.

During the last half of the fiscal year, the drive to clear the back-log in the Superior Court has resulted in increased trial activity, both in the Jury Waived Sessions and in hearings before Masters.

EMINENT DOMAIN DIVISION

The major function of the Eminent Domain Division is the representation of the Commonwealth in the defense of petitions for the assessment of damages resulting from land takings by eminent domain. The Commonwealth acquires land for various purposes including rights of way for roads, state colleges, recreation and parks, flood control, and easements. The Division deals primarily with the Department of Public Works, the Metropolitan District Commission, the Department of Environmental Affairs, the State Colleges and the University of Massachusetts.

Chapter 79 of the General Laws prescribes the procedure for eminent domain proceedings. Under Chapter 79, when property is taken, the taking agency makes an offer of settlement known as a pro tanto, which makes available to the owners an amount the taking agency feels is fair and reasonable, but reserves to the owners the right to proceed through the courts to recover more money. In years past, land damage matters caused

congestion in the civil sessions of the Superior Court. Special land damage sessions were set up to accommodate the trial of these cases and cases were referred to auditors for findings. The auditor system was not entirely satisfactory because too many cases previously tried by auditors were retried by juries. In 1973, the Legislature passed Section 22 of Chapter 79 which provides for the trial of land damage matters in the first instance before a judge in the Superior Court jury-waived session. Either party may reserve their right to a jury trial by filing an appropriate request within ten days of a judge's finding. A trial by jury may be had in the first instance only if both parties file waivers of their right to a trial before a judge. The statute also requires the court to make subsidiary findings of fact when the case is heard before a judge.

It has been the practice of our Division to try all our matters in accord with Section 22 before a Justice in a jury-waived session. In most instances, it is not necessary to retry the case, because the findings usually contain a clear statement of subsidiary facts which support the decision. Section 22 appears to be a vast improvement over the auditor system and a means of reducing the number of land damage cases requiring a jury trial.

Haufler v. Commonwealth, decided by the Supreme Judicial Court in May, was an appeal from a ruling excluding certain evidence relied on by the Commonwealth. The question was whether an intermediate appeal on a question of law is permissible under Section 22. The Court held that there can be *no* review of alleged errors until the jury trial is concluded. The unfortunate result of the decision is that jury-waived findings encompassing errors of law may now be introduced as prima facie evidence before juries.

The Division consists of a Chief, Deputy Chief, nine trial attorneys, five secretaries, three investigators, one legal engineer, one rent administrator and one administrative trial clerk. In addition to the trial of land damage matters, the Division has the responsibility of reviewing petitions to register land filed in the Land Court to determine whether the Commonwealth or any of its agencies or departments has, or may have, an interest which may be affected by the petition.

Rental agreements, contracts, deeds and documents relating to land under the control of any of the state's departments or agencies are approved as to form by the Eminent Domain Division. It is also the function of the Division to make itself available for consultation and the rendering of advice in connection with the Commonwealth's problems relating to land.

Pending Cases, Eminent Domain Division as of June 30, 1977

Eminent Domain Cases	718
Land Court Cases	283
Rent Court Cases	694
Total Cases Pending	1,695

Breakdown of Pending Eminent Domain Cases by County (June 30, 1977)

Barnstable	19
Berkshire	7
Bristol	40
Essex	129
Franklin	3
Hampden	37
Hampshire	21
Middlesex	123
Norfolk	45
Plymouth	33
Suffolk	131
Worcester	130
	718

Record of Activities, Eminent Domain Division, July 1, 1976 thru June 30, 1977

Rental Receipts	$197,783.00
Land Court Cases Received	171
Land Court Cases Closed or Withdrawn	119
Land Damage Complaints Received	138
Land Damage Cases Closed	166
Land Damage Cases Tried or Pro Bared	108

INDUSTRIAL ACCIDENTS DIVISION

The Industrial Accidents Division serves as legal counsel to the Commonwealth in all workmen's compensation cases involving state employees. Pursuant to G.L. c. 152, section 69A, the Attorney General must approve all payments of compensation benefits and disbursements for related medical and hospital expenses in compensable cases. In contested cases this Division represents the Commonwealth before the Industrial Accident Board and in appellate matters before the Superior Court and the Supreme Judicial Court.

There were 10,710 First Reports of Injury filed during the last fiscal year for state employees with the Division of Industrial Accidents, an increase of 914 over the previous fiscal year. Of the lost time disability cases, this Division reviewed and approved 1,824 new claims for compensation, and 150 claims for resumption of compensation. In addition, the Division disposed of 94 claims by lump sum agreements and 52 by payments without prejudice.

The Division appeared on behalf of the Commonwealth in 714 formal assignments before the Industrial Accident Board, as well as before the Courts on appellate matters. In addition to evaluating new cases, the Division continually reviews accepted cases, namely, those cases which require weekly payments of compensation to bring them up to date medically and to determine present eligibility for compensation.

Total disbursements by the Commonwealth for state employees' industrial accident claims, including accepted cases, Board and Court decisions and lump sum settlements, for the period July 1, 1976 to June 30, 1977, are as follows:

General Appropriation
(Appropriated to the Division of Industrial Accidents)

Incapacity Compensation	$4,061,853.22
Medical Payments	1,739,993.40
TOTAL DISBURSEMENTS	$5,801,846.62

Metropolitan District Commission
(Appropriated to M.D.C.)

Incapacity Compensation	$ 331,534.84
Medical Payments	116,952.54
TOTAL DISBURSEMENTS	$ 448,487.38

The Division also has the responsibility of collecting payments due the "Second Injury Fund" set up by Chapter 152, section 65, and defending the fund against claims for reimbursement made under Chapter 152, sections 37 and 37A. During the past fiscal year the Division appeared on 66 occasions to defend this fund against claims for reimbursement by private insurers. As of June 30, 1977, the financial status of this fund was as follows:

Unencumbered Balance	$ 217,385.55
Invested in Securities	781,000.00
TOTAL	$ 998,385.55
Payments made to fund	$ 183,216.06
Payments made out of fund	123,861.06

Pursuant to St. 1950, c. 639, §11A, as amended, the Chief of this Division represents the Attorney General as a member of the Civil Defense Claims Board. This function involves reviewing and acting upon claims for compensation to unpaid civil defense volunteers injured in the course of their volunteer duties. During the past fiscal year the Chief of this Division appeared at both sittings of the Board and acted on 13 claims.

The Division also represents the Industrial Accident Rehabilitation Board. In instances of an insurer's refusal to pay for rehabilitative training of injured employees, the Division appears before the Industrial Accident Board on behalf of the Industrial Accident Rehabilitation Board.

During the past fiscal year the attorneys of this Division were called upon numerous times to assist workers in private industry who contacted this Division regarding problems they had in securing compensation claims against private industry and their insurers. Every effort was made to assist these employees in resolving their difficulties or in referring them to the proper individual or agency.

DIVISION OF PUBLIC CHARITIES

The current statutory codification of the Attorney General's common law authority to enforce the due application of charitable funds is G.L. c. 12, §8, which provides:

> [The Attorney General] shall enforce the due application of funds given or appropriated to public charities within the commonwealth, and prevent breaches of trust in the administration thereof.

The Division of Public Charities is created by G.L. c. 12, §8B to perform the Attorney General's duties with regard to the enforcement of charitable funds.

Pursuant to this broad mandate, the Division of Public Charities today performs a number of different functions. Those functions can be divided into three main categories:

1. To register and monitor the activities of charitable organizations which engage in charitable activities or raise funds for charitable purposes in the commonwealth.

2. To represent the interest of the general public, the beneficiary of all public charities, in all court actions involving the creation of charitable interests or the disposition of funds already devoted to charitable purposes.

3. To represent the State Treasurer in all estates in which there is a possibility of an escheat to the commonwealth.

To carry out these functions, the Division now has a staff consisting of five attorneys (including the Director), one certified public accountant, one investigator, one accountant's assistant and seven clerical staff.

I. *REGISTRATION AND MONITORING OF CHARITABLE ORGANIZATIONS*

A. *Initial Registration and Annual Financial Reports*

1. *Functions of the Division.* General Laws Chapter 12, §§8E and 8F provide that all public charities which engage in charitable activities in the commonwealth must register with the Division of Public Charities and file an annual financial report. There are currently approximately 9,000 organizations registered with the Division. The filing date this year was extended to September 15. So far the Division has received 4,025 annual financial report forms with total filing fees of $70,375. All the information filed with the Division pursuant to the statute is a matter of public record.

The annual financial reports are due on June 1 of each year and the filing fee is $15.00. Each of these reports is reviewed to determine whether the charitable funds have been used in a proper manner. Among the problems looked for are: self-dealing by the officers, directors or trustees; imprudent investments; fund-raising or administrative costs which are too high; excessive salaries; and excessive accumulation of funds. If the form filed by a charitable organization is not approved, a letter is sent to the charity explaining why the form was not approved and requesting the necessary additional information. When the form is finally approved, the

approval is noted on a file card. There is a file card for each charitable organization registered with the Division and the cards show the current status of the annual filings of each charity.

If the form is not approved because the Division believes there has been some breach of trust in the administration of the charity, the Division may initiate legal action to replace the officers, directors or trustees responsible for the maladministration. In some cases, the Division also attempts to recover from the individual officers, directors or trustees any funds which have been misapplied.

2. *FY 1977 Accomplishments*

(a) *Verifying and Up-dating the Mailing List.* An effort was undertaken to eliminate from our files those organizations which were defunct but which had not notified us that they were no longer in existence.

Some 2,000 or 3,000 organizations were deleted from the charity files. In addition, the Division received annual financial reports from certain organizations which had not filed in several years. The end result was that the Division had a current listing of all these organizations which had registered and which were still in existence.

(b) *Defining the Term "Public Charity".* A uniform definition of the term "public charity" was developed which is now used by the staff to determine which organizations were required to file with the Division. Previously, such determinations had been made by individual attorneys on an ad hoc basis. "Public charity" is now defined as follows:

> Any non-profit organization, trust, foundation, group, association, partnership, corporation, society or any combination of them, whose purposes are substantially charitable in nature and which benefits the general public or some indefinite class thereof.

In connection with this definition, some "rules of thumb" have been developed based on the kinds of organizations which had registered with the Attorney General in the past. Strictly fraternal organizations and social clubs are not considered to be public charities because they are organized primarily to benefit their members, not the general public. The Division had a large number of fraternal organizations and social clubs registered with it and who are being notified that they are no longer required to file annual financial reports with the Division.

(c) *Registration of All Charitable Organizations in Massachusetts.*

(i) *Registration of new charitable organizations.* To assure the registration of new charitable organizations, the Division has arranged with the Secretary of State's office that it will send to the Division, every two or three weeks, copies of the articles of organization of every new corporation organized pursuant to G.L. c. 180, the Massachusetts non-profit incorporation statute.

The Division is now receiving approximately 200 such articles of organization every month. Each of these articles is reviewed to determine if the organization is charitable. If so, a letter is sent to the organization informing it of the requirement that it file an annual financial report with the Division and a file is set up on the charity. If the organization is not charitable, no notice is sent.

In many instances, it is unclear from the articles of organization whether the corporation is charitable. In those cases, a letter is sent to the organization asking for additional information.

(ii) *Registration of existing charitable organizations.* In fiscal 1977, the department obtained from the Internal Revenue Service a computer print-out of all Massachusetts organizations which had received a federal tax exemption under Section 501(c) of the Internal Revenue Code as either a religious, charitable, scientific, educational, literary, amateur athletic, civic or social welfare organization, or a fraternal organization which conducts charitable activities. The Department is currently in the process of checking this list, which contains approximately 12,000 organizations, against our own list of registered charities. A letter will be sent to each organization on the IRS list which is not registered with us informing it of the registration requirements and requiring that it register with the Division. The IRS list, of course, does not include charities whose principal office is located in another state. However, such charities are also required to register with this Division if they conduct charitable activities or solicitations in Massachusetts.

(iii) *Coordination with other state agencies.* The Division is in the process of coordinating its efforts with several other state agencies. For example, the State Lottery Commission has provided the Division with a computer print-out of all charitable organizations in the state which have Beano licenses. The Division is cross-checking this list with its own list of registered charities to ensure that all such organizations are registered .

(d) *Dissolution of Defunct Organizations*

An investigator has been assigned to review each inactive file to ensure that any funds remaining in the organization at the time of its termination were transferred to another charitable purpose. This requires reviewing the last annual report filed by the organization to determine if it had any assets at the time of its dissolution and, if so, locating and contacting one of the officers, directors, or trustees to determine what happened to those assets. The Division usually requires a copy of the organization's final federal tax return and a receipt from the charitable organization to which the funds were transferred before it will close out a file.

The task is further complicated for charitable corporations by G.L. c. 180, §11A, which provides that the *only* method for dissolving a charitable corporation is by filing a petition for dissolution in the Supreme Judicial Court. Many corporations have failed to file such a petition and have therefore not been officially dissolved. The Division is trying to identify these organizations, ascertain that the corporation has, in fact, transferred any remaining assets to another charitable organization, and then prepare and file a petition to dissolve the corporation pursuant to G.L. c. 180, §11B, which allows the Attorney General to dissolve charitable corporations. A form petition for dissolution has been prepared; the Division intends to begin filing mass petitions, as the Secretary of State does, on a regular basis.

An agreement was also reached with the Secretary of State's office to notify the Division, several weeks in advance, of the names of all c. 180

corporations they intend to dissolve in the future. This enables the Division to determine whether the corporation has any assets remaining before it is dissolved and to ensure that such assets are applied to a similar charitable purpose at the time of the dissolution.

(e) *Computerization.* Probably the most significant change in the Division is the contemplated computerization of the charity files. The Division is currently working on several different computer programs, aside from the docket control program, which will greatly streamline the administrative processes of the office.

(i) *Registration information.* The first system we hope to put into effect will allow us to place all the registration and filing information currently contained in bulky card files onto the computer. The name and address of each registered organization, together with certain key financial information taken from its annual reports and a history of its filings, will be entered into the computer and up-dated constantly. The computer will be able to provide the Division with a complete, up-dated print-out of our registered organizations on a regular basis.

This system will enable the Division to identify, at any given point in time, those organizations which are delinquent in their filings. This will aid immeasurably in the enforcement process. In addition, the computer print-out will enable the Division to provide the public, in minutes, with accurate, up-to-date information concerning any charity registered with the Division.

(ii) *Audit system.* A computerized audit system is also contemplated. Members of the clerical staff will enter into the computer certain financial data from the annual report filed by *each* charitable organization. The computer will then be able to "audit" such reports by doing certain programmed calculations. The results will be provided on a computer print-out to the staff of the Division. By using the computer to do these calculations, an enormous amount of staff time will be saved.

(iii) *Foundation Directory information.* A third system to be put on computer will enable the Division to up-date its Foundation Directory on a regular basis without having to review all the Foundation files by hand.

(f) *New Annual Financial Report Form (Form PC)*

In the past year, the Division has developed a new reporting form which is patterned after the industry audit guide for voluntary health and welfare organizations published by the American Institute for Certified Public Accountants. This new form requires much more detailed financial information from reporting organizations than the old financial report forms, and requires that the information be presented in a uniform manner.

Because the annual reporting forms must be filed by diverse types of organizations, a single form cannot possibly be adequate for all organizations. However, the Division did meet with representatives of various types of charities prior to printing the form in an effort to resolve some of the difficulties. In addition, the Division intends to work with an Advisory Committee to be appointed by the Attorney General to revise the form still further. A public hearing will be held in the fall before the final version of the form is promulgated as a regulation.

B. *Monitoring Charitable Solicitations in Massachusetts*

1. *Functions of the Division.* General Laws c. 68, §19 requires that all charitable organizations which intend to solicit funds in Massachusetts, except those organizations specifically exempted by §20, must obtain a certificate to solicit from the Division *prior* to conducting any charitable solicitations. This requirement applies both to charitable organizations incorporated or created in Massachusetts and to those organized in other states. The fee for obtaining a certificate to solicit is $10.00 per year and the certificate must be renewed each year. As of June 30, 1977, the Division had collected filing fees of $5,750 from the 575 organizations which had received a certificate to solicit in Massachusetts for the 1977 calendar year.

In part, the small number of organizations which are registered to solicit is due to the large number of statutory exemptions from the requirement. Some of the organizations which are exempt are schools, PTA's, hospitals, public libraries and volunteer fire companies. In addition, any organization which does not intend to raise more than $5,000 in a given year is not required to obtain a certificate to solicit unless it actually receives more than $5,000 in the course of its solicitation.

Organizations which solicit in Massachusetts and are required to obtain a certificate to solicit from the Division, are subject to several statutory restrictions on their fund-raising activities. They cannot use paid telephone solicitors (G.L. c. 68, §28); they cannot agree to pay a professional solicitor more than 15% of the gross receipts from any solicitation campaign (G.L. c 68, §21); and they cannot spend more than 50% of their gross income on fund-raising expenses (G.L. c 68, §22). In addition, there are specific statutory prohibitions against any sort of misrepresentation in connection with a charitable solicitation (G.L. c. 68, §30).

The Division reviews all applications for a certificate to solicit within ten days after their receipt, as is required by statute. One requirement for obtaining a certificate to solicit is that the charitable organization must file a copy of an audited financial statement. Thus, the review of the application involves a thorough review of the financial statement to ensure that the charity is being operated in a reasonable fashion and that the funds solicited are, in fact, being used for charitable programs.

The Division also responds to consumer inquiries concerning charitable organizations which are soliciting funds and investigates such organizations when complaints are received.

Finally, the Division is also responsible for registering all professional solicitors and professional fund-raising counsel who have contracts with registered charitable organizations. Professional solicitors and professional fund-raising counsel are required by G.L. c. 68, §23, to register with the Division and post a $10,000 bond. The registration fee is $10.00 and the registration must be renewed each year. In addition, a copy of each contract between a professional solicitor or professional fund-raising counsel and any registered charitable organization must be filed with the Division and approved by the Division. If such a contract is disapproved, the Divi-

sion must provide a hearing within 15 days to any party to the contract who requests one.

2. *Progress and Improvements in FY 1977.*

(a) *Verifying and Up-dating the Mailing List.* The same procedure described above for up-dating the list of registered charities applies, of course, to those charities which also have a certificate to solicit.

(b) *New Registration Form (Form PC).* The new Form PC, which is described above, now incorporates the application for a certificate of registration for solicitation purposes. The application is Section II of the new form.

Under the old system of forms, a charitable organization which solicited in Massachusetts had to file an annual financial report (Form 12) on June 1 of each year and a separate application for a certificate to solicit (Form 11) prior to January 1 of each year which was valid for the calendar year. This requirement meant that many organizations had two filing dates to remember. Also, because of the requirement that organizations applying for a certificate to solicit must submit an audited financial statement for their immediate preceding fiscal year, many organizations found themselves filing their financial statements twice: once to satisfy the annual financial report requirements and once to satisfy the requirements for obtaining a certificate to solicit.

The new Form PC consolidates both of the old forms, Form 11 and Form 12, and it will be due on June 1 of each year. The Division has already begun issuing certificates to solicit which are valid for the June 1 — May 31 year, rather than a calendar year. The Division hopes to introduce legislation to change the filing date for the annual financial report to comport with the filing deadline for federal tax returns.

The questions on the new Form PC allow the Division to monitor the expenditures of charitable organizations for fund-raising and other non-charitable purposes. In addition, the form requires that charities list the methods they intend to use in raising funds and any alternative names under which they intend to solicit funds. This information helps us in answering consumer inquiries concerning the fund-raising activities of charitable organizations. For example, if a consumer inquires about XYZ Charity which is soliciting with coin canisters door-to-door, we will be able to determine from our files whether, in fact, XYZ Charity is conducting such a door-to-door solicitation or whether the person soliciting may, in fact, be fraudulently representing that he/she represents XYZ Charity.

Finally, the Form PC has a Schedule which must be completed for all special fund-raising events and for all fund-raising campaigns run by a professional solicitor. This Schedule requires detailed information concerning the cost of the goods sold and the total expenses of the campaign as compared to the gross revenue. It also requires that the organization list the amount of compensation paid to any professional solicitor.

(c) *Verifying and Up-Dating Registrations of Professional Solicitors and Professional Fund-Raising Counsel.* The Division has begun cross-referencing the names of professional solicitors and fund-raising counsel as

listed on the charities' Form PC with its list of registered solicitors and fund-raisers. The Division has also been cross-referencing the names of charities with whom the professional solicitors and fund-raisers claim they have contracts with the Division's list of registered charities.

(d) *Investigations and Litigation.* The Division has investigated several organizations which are soliciting funds in the Commonwealth.

The following is a sample of some of the larger investigations currently in progress:

(i) *The Unification Church.* G.L. c. 68, §16 requires that all charitable organizations which solicit on public ways in the Commonwealth must keep accurate financial records concerning the amounts solicited and how those funds were expended. Because allegations had been made that the Unification Church was spending the money solicited for private commercial enterprises, rather than charitable purposes, and that certain misrepresentations were made in connection with the Church's solicitations, this Division demanded that the Church produce for the Division's inspection the records it was required to maintain pursuant to the statute.

When the Church failed to produce the necessary records, the Division filed an action in Suffolk Superior Court to compel them to produce the records. *Attorney General* v. *Holy Spirit Association for the Unification of World Christianity (Unification Church),* Suffolk Superior Court Docket No. 19414. After a hearing on an application for a preliminary injunction, the Church entered into a stipulation with this office that it would produce the documents requested. The Church has produced those documents but the records fail to comply with the statutory requirements.

(ii) *Greater Boston Council of Girl Scouts, Inc.* The Girl Scouts of the United States of America withdrew the local Council's charter in 1970, thus withdrawing the Council's right to conduct any official Girl Scout activities. Nonetheless, the officers of the local Council continued to maintain an office, pay rent, light and utilities, employ a secretary and generally keep the organization running despite the fact that it could not fulfill any of its corporate charitable purposes because it was not authorized to conduct Girl Scout activities. Over the past seven years, the corporation has spent over $150,000 and has accomplished *no* charitable purposes.

The Division has thoroughly reviewed all the corporation's extant financial records. Litigation is contemplated.

(iii) *Boston Mental Health.* We received allegations that this charitable organization was actually engaged in a private commercial enterprise in that it enters into contracts with private drug companies to perform scientific experiments and studies.

A suit was brought to obtain permission to investigate the organization, subpoena documents and take testimony under oath pursuant to G.L. c. 12, §8H. *Attorney General* v. *Boston Mental Health, Inc.,* Suffolk Probate Court No. 1575.

II *REPRESENTATION OF THE INTEREST OF THE GENERAL PUBLIC IN ALL COURT ACTIONS INVOLVING CHARITABLE INTERESTS*

General Laws Chapter 12, §8G provides:

> The attorney general shall be made a party to all judicial proceedings in which he may be interested in the performance of his duties under section eight, and service upon or notice to the director in any such proceeding shall be deemed sufficient service upon or notice to the attorney general.

Pursuant to this and other more specific statutes the Attorney General is made a party to three main categories of judicial proceedings:

(a) *Probate of Wills:* The Division is notified when:

1. the will provides charitable bequests, no matter how small, and whether the bequests are made outright or are contained in a testamentary trust;
2. there are no known heirs of the decedent; or
3. the executors or administrators of the types of estates described in (a) and (b) present their accounts for allowance.

(b) *Charitable Trusts.* The Division is notified when:

1. the trustees of a charitable trust present their annual accounts for allowance;
2. the trustees of a charitable trust petition the court for instructions;
3. the trustees of a charitable trust file a petition for *cy pres* or for permission to modify or deviate from the terms of the trust;
4. a petition is filed for termination of a charitable trust;
5. a petition is filed for the appointment or removal of a trustee; or
6. a suit is brought against the charitable trust.

(c) *Miscellaneous.* The Division is notified when:

1. a petition for the sale of real estate is filed by the trustees of a charitable trust or the executor or administrator of an estate in which the Division has an interest; or
2. the accounts of common trust funds with charitable interests are presented for allowance.

The Division now has over 18,000 open probate cases. This does not include the Public Administration estates or the charity files. It includes only the files pertaining to the probate of estates with charitable interests and the supervision of charitable trusts.

A. *Progress and Improvements in FY 1977.* In FY 1977, the Division reviewed 1,021 new wills, 618 executor's accounts and 47 administrator's accounts.

A concerted effort was made this year to catch up on the backlog of estate accounts which had to be reviewed. The Division is in the process of developing a computerized system to oversee the estate cases.

B. *Charitable Trusts*

1. *Functions of the Division.* Charitable trusts, unlike private trusts, are perpetual. Thus, whenever a testamentary charitable trust is established, the Division must set up a probate file on the trust which can be expected to remain an open court file in perpetuity.

The reason these files can never be closed is that the trustees must file annual accounts of their administration of such trusts with the probate court. The Attorney General must be notified when such accounts are presented for allowance (G.L. c. 206, §24) and the Division must review the accounts and file either an appearance or a waiver. These probate accounts are accepted by the Division in lieu of the financial report form required on other charities and copies are filed in the open charity files which are available for public inspection.

Furthermore, the Division must be notified of any other court actions taken with regard to these testamentary charitable trusts. Thus, whenever the trustees present a petition for instructions or a petition for *cy pres* or a petition to modify or deviate from the terms of the trust, etc., the Division is made a party to the action.

(a) *Petitions for Instruction, Deviation, Modification and Termination.* In FY 1977, the Division was involved in approximately 300 cases involving petitions for instructions, deviation, modification and termination. In connection with these cases, the Division filed several briefs in both the Appeals Court and the Supreme Judicial Court when certain cases were appealed. One typical case handled by the Division in FY 1977, was *Phillip J. Nexon, Trustee* v. *The Boston Safe Deposit and Trust Company,* Appeals Court No. 77-2. This was a petition for instructions brought by the Trustee of a testamentary trust established under the will of Phillip B. Bayes. The question was whether the language of the trust empowered the trustee to pay over the entire principal of the trust to the life beneficiary, thereby extinguishing the charitable remainder. The Appeals Court upheld the decision of the Probate Court which had found in favor of the Division's position that the charitable interests could not be thus extinguished.

(b) *Petitions for Appointment or Removal of Trustees.* In FY 1977, the Division handled 19 cases involving the appointment of trustees. The Division also investigated two charitable trusts after receiving complaints that the trustees were not acting in the best interests of the trusts and ought to be removed. In one of these cases, the Division has filed a petition seeking the removal of the trustee. *Attorney General* v. *Richard E. Byrd, Trustees of the Admiral Richard E. Byrd Foundation,* Suffolk Probate Court No. 497969. That petition will be heard in the fall. In the other case, negotiations are underway for removal of the current trustee and termination of the trust.

(c) *Other Cases Involving Charitable Trusts.* The Division has filed answers and appeared in several other kinds of cases involving charitable trusts in FY 1977. An example of this type of case is *Elizabeth Ann Ebitz, et als* v. *Pioneer National Bank,* Appeals Court No. 76-12. This was a suit brought by a young woman who had applied to the bank, as trustee of a charitable trust, for a scholarship. The bank interpreted the terms of the trust as allowing it to make scholarship grants only to men. The Probate Court and the Appeals Court both found for the plaintiff and the Division and held that the term "young men", as used in the trust instrument, should be interpreted to include young women, as well.

C. *Miscellaneous*

1. *Petitions for the Sale of Real Estate.* Whenever the executor of an estate in which this Division has an interest or a trustee of a charitable trust desires to sell real estate belonging to the estate or trust, and he is not specifically authorized by the will or trust instrument to do so, he must apply to the court for a license to sell. The Division is notified of such petitions and it is our job to ensure that the real estate is sold for a fair price and that there is no self-dealing. This usually requires the obtaining of an appraisal of the property from the executor or trustee and a determination to whom the property is being sold.

In FY 1977, we disposed of 73 petitions for the sale of real estate.

2. *Common Trust Fund Accounts.* G.L. c. 203A, the Uniform Common Trust Fund Act, permits corporate and other fiduciaries to pool charitable trust funds for purposes of investment. The purpose of pooling smaller funds into a larger fund is to enable all the trusts to benefit from the diversification of investments which is possible only with a larger fund. Annual accounts of such common trust funds must be filed with the probate court and notice must be given to the Division when such accounts are presented for allowance if any charitable interests are involved.

These accounts must be reviewed like any other trust account to determine that the investments are proper, that no self-dealing has occurred, etc. However, these accounts are usually incredibly voluminous and require an accountant to review them.

In reviewing some of these accounts over the past year, the Division has discovered numerous discrepancies between the accountings made to the probate court and the fiduciaries' audited financial statements. We have also discovered a number of instances where improper accounting methods have been used. Consequently, the Division has filed a number of appearances on the allowance of such accounts. Most of these cases have been resolved with the corporate fiduciary agreeing to re-submit its probate account, but a few such accounts are awaiting a hearing.

III. *REPRESENTING THE STATE TREASURER IN ALL ESTATES IN WHICH THERE IS A POSSIBILITY OF AN ESCHEAT*

General Laws Chapter 192, sec. 1A provides that when a will is presented for allowance and there are no known heirs at law of the decedent, the Attorney General must be made a party to the petition. General Laws Chapter 194, sec. 4 provides that the State Treasurer shall be made a party in all intestate estates where there are no known heirs and a public administrator is appointed to administer the estate. The Division of Public Charities receives the notice of such estates and represents the interests of the Commonwealth and the general public in seeing that such estates are administered properly.

A. *No Known Heirs*

1. *Functions of the Division.* When the Division receives a citation concerning the allowance of a will in an estate where there are no known heirs, a letter is sent immediately requesting a copy of the will, the approximate

amount of the estate and information concerning the circumstances under which the will was executed, the physical and mental capacity of the testator at the time the will was executed and the relationship of the persons named in the will as beneficiaries to the testator. The will is then reviewed, together with all additional information, to ascertain: (1) whether it was executed properly, i.e., that it has the correct number of witnesses, that none of the witnesses is a beneficiary, etc.; (2) that the decedent was mentally and physically capable of executing the will; and (3) that no undue influence was used on the decedent. In many cases, the determination of these facts requires much correspondence and many telephone calls.

If the person reviewing the will is satisfied that all is in order, the Division will file a waiver on the allowance of the will. However, as with wills under which charitable interests are created (as discussed above), the Division must continue to monitor the estate and review all accounts until the estate is finally closed. The Division's primary interest in such estates is to ensure that if a bequest fails or the will is invalid for some reason, the estate will escheat to the Commonwealth. In FY 1977, the Division received $6,587.19 in escheats for such estates.

B. *Public Administrations*

1. *Functions of the Division.* When the Division receives notice that a petition has been presented for the appointment of a public administrator, the estate is monitored until it is closed and the final escheat has been received.

2. *Progress and Improvements in FY 1977.* In FY 1977, the Division received $331,848.31 in escheats from regular Public Administration estates and $19,979.16 from Public Administration estates with a total value of less than $700. (The latter estates are governed by G.L. c. 194, §17, which permits the P.A. to liquidate all the estate's assets and turn them over to the State Treasurer who holds the money for a year to pay any claims that arise. Thereafter, the money escheats.)

During FY 1977, the Division opened 207 new P.A. estates and closed 334. The number of open P.A. estates at the end of the FY 1977 was 452.

The Division's files on the estates being administered by two Public Administrators were forwarded to the Criminal Division for criminal prosecution as it appeared that the Public Administrators had misappropriated funds belonging to the estate which should have escheated to the Commonwealth.

IV. *THE FOUNDATION DIRECTORY*

The Division is presently in the process of preparing a Foundation Directory. The Directory will consist of entries for more than 1,100 foundations located in Massachusetts. Each entry contains the name and address of the organization, the names of its officers or trustees; financial information including the amount customarily paid out in grants; and a statement of purpose. Wherever possible, information is also provided about the types of programs which the foundation has supported in the past and any restrictions on its grants as to geographic area or particular population groups.

TORTS DIVISION

This Division continues to operate in three major areas: (1) Torts, (2) Collections and (3) Petitions for Compensation of Victims of Violent Crimes.

Our operational procedures instituted in 1975 are working well, cases and correspondence being handled on an up-to-date and current basis.

The Division continues to realize maximum recovery on behalf of the Commonwealth in collection cases. We have been successful in eliminating some of the small cases which were referred to us by various schools and agencies, since it is our belief that those matters are more appropriately handled by collection agencies.

In the area of victims of violent crimes compensation is paid in accordance with the provisions of the law, but we defend those actions in which compensation is unwarranted.

In addition, new rules of procedure to be followed in violent crime cases have been drafted in conjunction with the Administrative Committee of the District Courts. It is expected that these rules will become effective in the very near future.

In FY 1976-1977, 649 tort cases were opened. The majority of these cases are motor tort cases. During this period the number of tort suits brought against the Commonwealth, its officers and employees was 139. Releases and Executions received amounted to $251,692.64.

In addition, 792 Violent Crime cases were opened during this period. Hearings were held on 216 of these cases and awards were made by the court amounting to $1,124,807.35.

Payments of so-called Moral Claims are kept to a minimum.

The total collections realized during the stated fiscal year amount to $429,248.39.

The Division presently consists of a Chief, five (5) attorneys and one (1) legal assistant. The following is a breakdown of the monies recovered by the Division during the fiscal year:

Departments	Amount Rec'd	No. of Claims Processed
Mental Health	$61,018.51	31
Public Health	51,553.25	301
Public Safety	6,025.72	11
Public Works	75,822.02	333
M.D.C.	4,133.94	37
Education	14,248.52	265
State Colleges	20,180.98	331
Administration & Finance	3,664.18	5
Board of Retirement	150.00	3
Commission for the Blind	1,011.93	8
Corrections	879.01	9
Environmental Management	3,034.00	5
Fisheries & Wildlife	80.00	3
Industrial Accidents Division	2,500.00	1
Labor & Industries	45.00	3
Marine & Fisheries	115.00	2
Marine & Recreational	607.67	1
Mass. Rehabilitation	219.60	6
Military Division	800.00	4
Secretary of State	1,652.63	30
Treasury Department (Probate Collections)	$181,506.43	—
Total	$429,248.39	1389

SPRINGFIELD OFFICE

The Springfield office handles matters of concern to the Attorney General in the four Western Counties: Hampden, Hampshire, Franklin and Berkshire. The primary function of the office has been to handle all division references and requests for assistance pertaining to Eminent Domain, Criminal, Torts, Contracts, Administrative, Environmental, Collections, Public Charities, Victim of Violent Crime cases and election law violations. In addition, Consumer Protection matters originate in the Springfield office.

The office supplies personnel to the Board of Insurance Cancellation and the License Board of Appeals for monthly sittings which consider approximately 20 cases per sitting.

Listed below are cases which are presently being handled in the Springfield office.

EMINENT DOMAIN	*TORT*	*ADMINISTRATIVE*
5	10	23
ENVIRONMENTAL	*COLLECTIONS*	*VICTIM OF VIOLENT CRIME*
1	7	19
	CRIMINAL	
	2	

In the past year the Consumer Protection section of the Springfield office has investigated numerous complaints and commenced a number of court actions. The investigations and subsequent suits involve cases such as false going out of business sales, bait and switch advertising, misrepresentation of land for home building, unit price violation and odometer tampering. The most significant case was the investigation, prosection and subsequent conviction and sentencing of automobile dealers involved in altering odometers. This case marked the first successful criminal prosecution of automobile dealers in Massachusetts for turning back odometers.

In addition to the aforementioned cases there were various other cases in which Consent Judgments were obtained or other actions taken. The following is a summary of those cases.

LAWSUITS	*CONSENT JUDGMENTS*	*ASSURANCE OF DISCONTINUANCE*	*SAVINGS*
2	3	8	$7,776.46

Although the vast majority of individual consumer complaints are referred to local consumer groups, there is still a pending backlog from the 1975-76 fiscal year. We accepted complaints from those individuals who reside in towns where there is no local consumer group, and from those individuals who for other reasons are unable to obtain assistance from a local group. The results of those actions are as follows:

OPENED	*CLOSED*	*PENDING*	*SAVINGS*
233	350	103	$8,979.62

The staff also fulfills speaking engagements and answers numerous inquiries in the consumer area.

In addition, the office renders legal assistance at the request of various state agencies.

Our total correspondence on various matters and inquiries other than consumer complaints averages over 175 letters per month.

The staff consists of one Administrative Assistant, two Assistant Attorneys General, two Investigators in Consumer Protection and two Secretaries.

II. CRIMINAL BUREAU

In fiscal 1976-1977, the Criminal Bureau continued its responsibilities in the traditional areas of trials, appeals, organized crime and drug abuse. In addition, the Bureau expanded its efforts with the operation of a Violent Crime Unit and a Nursing Home Task Force.

The Trial Division has been particularly active in the area of economic crime. A major investigation into abuses in the Commonwealth's state tax system has been undertaken. Prosecutions have been pursued dealing with welfare provider fraud, several different forms of larceny, insurance fraud, banking law violations, conflict of interest, small loans violations and campaign laws violations. Additionally, the Criminal Bureau and the Consumer Protection Division have undertaken a cooperative effort to combat consumer crime. Although this program promises to develop several complex cases requiring the attention of several attorneys, it should result in a definite deterrent effect as well as the recovery of large sums of money for the Commonwealth. In one instance, this combined effort resulted in the conviction of several defendants in Hampden County for larceny and automobile odometer spinbacks.

The Organized Crime Section continued to be involved in such diverse areas as gaming, bribery, cigarette smuggling and theft from state agencies. In one case a former state trooper was convicted of bribery and concealing auto theft. The section also cooperates with other agencies in combatting the activities of criminal organizations and provides technical assistance to law enforcement offices and district attorneys. The type of technical assistance that is supplied includes photographic aid and advice and expert testimony in such novel areas as voice print identification. The Section provided assistance to law enforcement agencies both within the Commonwealth and in other states on more than 300 occasions.

The Appellate Section continued to represent the interests of the Commonwealth in federal habeas corpus actions. Of particular significance was a class action suit brought by certain juvenile defendants who alleged that their pending trials were barred by a previous Supreme Court decision rendering the proceedings against them in juvenile court unconstitutional. The district court enjoined approximately 100 pending criminal trials. On appeal, however, the Court of Appeals reversed on the merits and ordered the petition dismissed. Certiorari was successfully opposed in the United States Supreme Court. In another case involving a gambling conviction on the basis of wiretap evidence, the Section was successful in arguing for reversal of a federal district court's grant of a writ of habeas corpus. Certiorari to the Supreme Court was again opposed with success.

The Section also successfully defended in the Supreme Judicial Court the constitutionality of the Commonwealth's "blue laws" as well as the statute prohibiting possession of marijuana.

As a result of an agreement reached with the Department of Correction relative to their handling of federal civil rights complaints against their employees, as well as the referral of some writs of error to the district attorneys, the number of post conviction or appellate matters handled by the Section has been reduced. During fiscal year 1976-1977, attorneys appeared in various courts in over 250 cases involving the following: petitions for certiorari or appeals in the United States Supreme Court, appeals to the First Circuit, petitions for writs of habeas corpus in the Federal Disrtict Court, federal civil rights actions, appeals to the Supreme Judicial Court, appeals to the Appeals Court, writs of error and other extraordinary matters in the Single Justice Session, and state habeas corpus proceedings in the Superior Court.

The Appellate Section also continued to process demands for the rendition of fugitives from justice. The Section examines demands both for the law enforcement officials of the Commonwealth and from the governors of other states, and renders an opinion as to the legal adequacy of each. Approximately 194 rendition demands were processed during fiscal 1976-1977. An appellate Section attorney must appear in court whenever a rendition warrant is challenged. The Appellate Section also administers the Commonwealth's criminal usury laws.

The Drug Abuse Division at the present time engages in two primary activities: the speaker's program and the drug education seminar.

The Division has several people who are available for speaking engagements and have addressed civic, professional, social and educational groups on over 80 different occasions since January, 1975. The majority of these requests were carried out during the evening hours. It has been our experience that many groups will request speakers on a semi-annual or annual basis. Judging from the requests as well as the turn out at these various functions, it is evident that there is a great deal of interest by the general public in the drug abuse program.

The drug education seminar is a two-week course which addresses the problem of drug abuse through the means of education. Although geared primarily for the police, it also serves other professionals working in drug-related fields. The program works to educate individuals dealing directly with drug-related matters and on a broader plain, trains these professionals to train others in their respective fields. Thus, the program covers every aspect of the drug abuse problem from psychological and pharmacological considerations to search and seizure and street enforcement techniques.

Since September, 1976, the Drug Abuse Division in conjunction with state and community colleges has held 12 two-week seminars throughout the Commonwealth from which 350 members have graduated. After reviewing the curriculum, each of the colleges involved agreed to award three academic credits for successful completion of the course. We have obtained the services of experts in various related fields for use in the seminars. These individuals donate their time on a regular basis and represent a

wide range of agencies and institutions including the Massachusetts State Police, the Federal Drug Enforcement Administration, the Treasury Department, the United States Customs Bureau, and the Office of the Mayor of the City of Boston, as well as various drug and alcohol rehabilitation programs.

The Violent Crime Unit has been active in two areas of prosecution during the past year. Since December of 1977, there has been a violent crime screening program in Norfolk County, which was set up in cooperation with the Norfolk County district attorney to accelerate prosecution in 12 areas of violent crime cases. These 12 areas include most types of assault, breaking and entering, explosive charges, firearm charges, intimidation of witnesses, kidnapping, mayhem, rape and robbery. The Norfolk County screening unit, composed of three assistant attorneys general processed over 100 cases in the courts of Norfolk County averaging 84.44 days from arrest to disposition in the Superior Court and 34.34 from arrest to disposition in the District Court.

In Suffolk County, a racial crime monitoring unit received, reviewed and investigated several hundred incidents of racial violence. The unit selected the most serious reported incidents of racial crime for priority prosecution by the Major Violators Division of the Suffolk County District Attorney's Office, and referred other less serious charges for district court prosecution.

The Suffolk County unit was involved in the investigation of the bombing of the Suffolk County Courthouse, the Dorchester Armory and the bombing at Logan Airport. The unit coordinated efforts with the United States Attorneys in Maine and Massachusetts and the district attorney of Suffolk County. Ongoing liaison efforts were maintained with the Massachusetts State Police, the Boston Police Department, the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco and Firearms.

Although the Criminal Bureau has had a continuing interest in the problem of nursing home fraud, a more intensive effort was commenced in February of 1977 with the formation of a Nursing Home Task Force.

On February 23, 1977, the Attorney General commenced an intensive state wide effort to confirm and identify fraudulent claims for Medicaid reimbursement, and those responsible in the nursing home industry. A number of investigative techniques were applied, the most prominent of which was the coordinated investigation by the Task Force auditor-investigator staff, aimed at unravelling suspect complicated financial transactions and disclosing fraud.

The Attorney General's original suspicions were quickly confirmed. Every single audit by the Task Force has established significant over payments of Medicaid funds to nursing home operators, and/or some type of larcenous scheme.

Working as independent units, and following the successful team concept employed by New York State, lawyers, special investigators and special auditor-investigators have reviewed the books and records of nursing homes, vendors and suppliers, analyzed nursing home reimbursement expense claims, interviewed scores of potential witnesses and presented evidence to Grand Juries.

Our investigations to date indicate more than merely isolated instances of Nursing Home Fraud. More significantly they appear to confirm widespread financial chicanery and wholesale misappropriation of taxpayer funds. The common thread is extensive fraudulent application for reimbursement for expenditures that have nothing whatsoever to do with nursing home patient care.

The evidence suggests that the taxpayer has unwittingly subsidized private residential landscaping expenses, personal travel expenses, personal food items at phenomenal levels, personal business interests, works of art, vast quantities of liquor, interior decorating expenses, personal pharmaceuticals, heating fuel for private homes, personal charitable contributions, extensive vacations, real estate taxes, private auto expenses, mink coats, personal investment stocks, renovations to private residences, entertainment and excessive personal profits.

Fraud indictments by the Attorney General's Task Force, have already led to the conviction of eight defendants, representing some twenty-two nursing home throughout the state, and the ordered restitution of misappropriated Medicaid funds totalling some half million dollars. It should be pointed out that this restitution in no way precludes the Attorney General and the Department of Public Welfare from pursuing civil remedies for further recoupment. The Task Force has already turned over to the Department of Public Welfare evidence involving civil fraud of more than than one and one half million dollars.

Thus, in addition to prosecuting those who have committed nursing home related fraud, the Attorney General is pressing, in each instance, for substantial restitution of the fruits of the crime.

The Task Force has presented substantial testimony and physical and documentary evidence before Grand Juries which should lead to the filing of felony indictments charging various defendants with Medicaid fraud and larceny in excess of one million dollars.

A. *RESTITUTION AND RECOVERY OF FUNDS*

Restitution is a form of recoupment applied by the Task Force in criminal cases only. In those cases where a larceny of Medicaid funds is involved, the Attorney General will not accept a guilty plea unless the defendant makes full restitution of the amount of the theft. The recovery process, on the other hand, involves the turnover of audit findings to the Department of Public Welfare for recoupment by administrative or civil action.

In addition to restitution, the Attorney General has sought and received significant fines as well as requested heavy costs to repay the taxpayers for those costs incurred incident to an investigation.

A breakdown of Task Force restitution and recoveries follows:

a.	COURT ORDERED RESTITUTION	$ 436.058.05
b.	COSTS AND FINES	83.150.00
c.	AMOUNTS IDENTIFIED FOR CIVIL RECOVERY	1.577.055.77
d.	CIVIL SETTLEMENTS	35.473.04
e.	MONIES RETURNED TO PATIENTS	39.455.00
	TOTAL	$2,157,191.86

3. *PATIENT ABUSE*

Nursing home patients are literally at the mercy of their environment. The population of health care facilities rely, for protection, on their relatives, community organizations, and public bodies to assist them.

It is for this reason, and to assure high quality patient care to the citizens of the Commonwealth, that the Attorney General's Task Force has made patient abuse a primary concern.

When funds for patient care are diverted to private pockets it creates a potential for patient neglect and abuse. Elimination of these conditions through criminal prosecution is unlikely as it is nearly impossible to fix criminal responsibility for particular neglect situations. The Attorney General's Task Force, however, is committed to follow-up on all referrals and perform a watch dog role.

A liaison has been established between the Task Force and the Department of Public Health, Office of Elder Affairs, and the Department of Public Welfare with a view towards strengthening remedial actions whether administrative or judicial.

Where criminal prosecution is either unwarranted or impossible, the Task Force may refer the facts to specific professional licensing authorities for possible disciplinary action.

The prospect of eliminating abuse of nursing home patients has been enhanced through our liaison with community groups throughout the state. The role of these groups ranges from daily individual contact with those in nursing homes to a citizen-monitoring of governmental agencies concerned with the delivery of health care. These organized and interested groups, whose main concern is the improvement of care for nursing home patients, represents a major potential role for change in the years to come. Working in an atmosphere of mutual respect and trust, they serve as a valuable resource in the reporting of potential incidents.

C. *DISCIPLINARY REFERRALS*

It has been the policy of the Task Force to refer allegations of professional misconduct to the appropriate disciplinary bodies. Referrals have contributed to sanctions by the Department of Public Welfare including the denial of payments, decertification measures by the Department of Public Health, de-licensing by the Board of Nursing Home Administrators and, in one case, a hearing for de-licensing by the Board of Registration and Discipline in Medicine of a practicing physician.

At the present time, the Task Force is preparing the Department's application to H.E.W. for certification and participation in federally reimbursed programs. The terms of the application bring together as one cohesive entity two State Agencies: the Department of the Attorney General and the Bureau of Welfare Auditing. With the combined expertise of these two agencies and federal financial participation, the effort to stop Medicaid fraud will spread beyond the nursing home industry and will include investigations and prosecutions of all providers within the Medicaid system.

The Employment Security Division works closely with the Massachusetts Division of Employment Security. It prosecutes employers who are delin-

quent in paying employment security taxes and employees who file and collect on fraudulent claims for unemployment benefits. The vigorous prosecutions made by this Division have resulted in the recovery of substantial sums of money for the Commonwealth.

The Division is charged with the duty of pursuing those individuals found not complying with the Employment Security Law. During this fiscal year the Division waged an energetic and forceful program in handling all cases referred to the Division for criminal prosecution. At the same time, the Attorney General's office has maintained a policy of giving the erring individual, corporation or business entity every opportunity to make settlements out-of-court. Concentrated office conferences were conducted with the principals involved to determine whether or not criminal proceedings should be initiated. Criminal prosecutions were taken against those failing to show cooperation with the terms of agreement made by this office, but only after they had received an opportunity to discuss the matter thoroughly.

During the fiscal year ending June 30, 1977, the Division of Employment Security processed the following cases:

Employer	908
Employee	658
S.J.C.	19
Board of Review	14
	1599

Over $236,000 was recovered for the Commonwealth in employee cases and over $1,900,000 in employer cases.

The cases now existing in which prosecutions may be commenced could yield between $950,000 and $1,200,000 in employee cases and over $4,000,000 in employer cases.

III. EXECUTIVE BUREAU

ELECTIONS DIVISION

The primary responsibility of the Elections Division is the investigation and prosecution of violations of the Commonwealth's election laws.

The Division is extremely active in the area of enforcing the laws pertaining to campaign and political finance. (G.L. c. 55.) In fiscal year 1977, the Office of Campaign and Political Finance reported 170 candidates or treasurers of political committees who failed to file the required financial disclosure reports. Compliance with the statute was secured in 148 instances by administrative action, and in 22 instances by the institution of civil litigation. Various city and town clerks reported 37 additional violations, resulting in civil litigation on eight occasions.

The Elections Division also enforces the statute requiring legislative agents and their employers to file financial disclosure statements with the Office of the Secretary of State. (G.L. c. 3, §§43, 44, 47). Last year, 44 violations of this section were reported by the Secretary. As a result of administrative action by this Division, reports were filed by all reported violators.

The Division was also involved in litigation questioning the validity of state statutes. Of special note, is a case decided by the United States

Supreme Court, *First National Bank* v. *Bellotti*, in which the constitutionality of the state's restriction on corporate political contribution was in issue.

In January, 1977, the Massachusetts Supreme Judicial Court issued its decision in the case of *Eugene McCarthy* v. *Secretary of State*. This case involved important questions regarding the requirements of state law in the certification of signatures on nomination petitions by local election officials and the process of judicial review thereof. The case of *Lowery* v. *Guzzi* also involved the certification of nomination signatures by local registrars. Upon appeal to the Massachusetts Supreme Judicial Court this case was remanded to Superior Court in light of the *McCarthy* decision. Challenges to the state statutory scheme for gathering signatures on nomination petitions were defended successfully before a three-judge panel in the cases of *LaRouche* v. *Guzzi* and *Nelson* v. *Guzzi*. In *Pace* v. *Guzzi*, the Division successfully defended a challenge to the election time-table for special elections to the State Legislature, and in *Town of Ayer* v. *Guzzi*, an attempt to have the 1975 census set aside on constitutional grounds was thwarted.

The Division represented the State Ballot Law Commission in proceedings for judicial review of hearings conducted by the Commission in the cases of *Huard* v. *Bromberg* and *Lowry* v. *Guzzi*. The Division also sat as advisory counsel at all administrative hearings conducted by the Commission.

Another major area of activity within the Division is the enforcement of the state Open Meeting Law. The Division's chief responsibilities are at the state level. However, the Division is currently engaged in a project in conjunction with the League of Women Voters to lend momentum to the enforcement of this statute by their participation in reporting violations at the local level. During fiscal year 1976-1977, 34 reported violations of the Open Meeting Law were settled extra-judicially. Through litigation, the Division was successful in obtaining compliance with the law by a school committee in the cases of *Attorney General* v. *Bevins, et al.*, by a housing authority in the case of *Attorney General* v. *Vaselakis, et al.* and by a Board of Selectmen in the case of *Attorney General* v. *Walker et al.* On appeal by the Division before the Appeals Court is another case involving a school committee, *Attorney General* v. *Andrade et al.*

VETERANS DIVISION

The Veterans Division continues to function primarily as an informational agency, referring private citizens to appropriate federal and state officials and agencies regarding veterans' benefits. The Division also provides counsel to the Commissioner of Veterans Services and the Veterans Affairs Division of the Department of the Treasury.

The Division is presently involved in a number of cases pending before various State and Federal courts. The most noteworthy of these cases is *Feeney* v. *Dukakis*, an appeal from a decision of the Federal District Court ruling that the Massachusetts Veterans' Preference laws are unconstitutional. An important collateral issue decided favorably to the A.G. by the Massachusetts Supreme Judicial Court in that case is the authority of the Attorney General to prosecute an appeal over the objection of the Gov-

ernor and the agency which is represented. Pending in the United States District Court are the cases of *Reynolds* v. *Dukakis,* challenging the exclusion of conscientious objectors from state veterans' benefits, and *Strong* v. *Veterans' Commissioner,* challenging the three-year residency requirement for eligibility to receive state veterans' benefits. *White* v. *Northampton Veterans' Agent and Commissioner of Veterans' Services, Pelargonio* v. *Commissioner of Veterans' Services* and *Savastano* v. *Civil Service Commission* are cases assigned to the Division in the state superior courts involving the eligibility of individual plaintiffs for state veterans' benefits.

The Division also represented several state and community colleges at hearings before the Veterans Administration involving the administration of Federal veterans' educational benefits.

IV. GOVERNMENT BUREAU

The Government Bureau has four main responsibilities:

(1) Defense of state agencies;

(2) Initiation of affirmative litigation on behalf of state agencies;

(3) Preparation of Opinions of the Attorney General and Opinions concerning Conflicts of Interest pursuant to G.L. c. 268A, §10;

(4) Legal review of all newly enacted municipal by-laws pursuant to G.L. c. 40, §32.

A report on those functions as well as several additional responsibilities follows.

A. *DEFENSE OF STATE AGENCIES*

The Government Bureau represented the Commonwealth and its various agencies in defensive litigation in both state and federal courts. The lawsuits typically involved constitutional and administrative law issues in diverse areas of public law.

Government Bureau attorneys maintained an average caseload of from 50 to 90 defensive lawsuits.

During fiscal 1976-1977, the Division received 562 new cases. By quarters, the breakdown is the following.

(1) July — September, 1976	117
(2) October — December, 1976	133
(3) January — March, 1977	154
(4) April — June, 1977	158

By subject matter and client, the FY 1977 caseload was reduced to the following numbers (with miscellaneous and nonrecurrent cases omitted).

Class of Lawsuit	*Number*
Civil Service Appeals	64
ABCC Appeals	54
Welfare Department	51
provider actions, 31	
recipient actions, 16	
miscellaneous, 4	

State Employment Disputes termination, status, benefits	37
Judges sued for alleged abuse of discretion, typically in SJC under G.L. c. 211, §3	31
Education, State Board	30
Boards of Professional Registration	
Registry of Motor Vehicles appeals from license sanctions	29
Taxation	25
Insurance	19
Department of Public Utilities	18
Board of Conciliation and Arbitration	15
Rate Setting Commission	14
Department of Public Health	10

Also sued for administrative action or decision during the reporting period were the Department of Community Affairs (7) (usually decisions of the Housing Appeals Committee approving moderate and low income housing developments); the Department of Correction (7); the Department of Public Safety (6); the Department of Mental Health (5); the Lottery Commission (5); and the Banking Commissioner (3).

Attorneys appeared extensively in both state and federal courts and logged approximately 35 arguments in the Supreme Judicial Court and 15 in the Circuit Court of Appeals.

The time spent representing particular agencies cannot be measured exclusively by the number of cases. The representation of certain agencies involves a substantial commitment to complex major litigation. For example, the Government Bureau defended the rates set for the Boston Edison Company by the Department of Public Utilities in the most extensive litigation ever brought to the Supreme Judicial Court on utility rate setting. The case involved twenty rate setting issues and absorbed more resources than any other single piece of litigation during the fiscal year. Of the eighteen issues which the Attorney General contested, the Supreme Judicial Court upheld all but one of its arguments. The Department's overall rates were upheld in their entirety.

Another major case which began during the fiscal year was the so-called Lahey Clinic litigation. In this case, the Lahey Clinic sought to enjoin the Government Bureau's client, the Health Facilities Appeals Board, from considering whether or not Lahey Clinic's planned construction of a major new facility in Burlington, Massachusetts, was in keeping with the certificate of need — required for all health related capital expenditures — that had been granted Lahey in 1972. The trial court found the HFAB to be without jurisdiction, a determination which the Government Bureau has since appealed to the Supreme Judicial Court.

Also during the fiscal year, the Government Bureau successfully negotiated a settlement in the Argo Merchant Oil spill case. The spill occurred in December, 1977. At that time it was feared that hundreds of millions

of dollars of damage would result. In fact, Massachusetts has been fortunate, and only a minor amount of damage was caused. The Government Bureau reached a settlement for $20,000. The amount was small, but the principle that the state has a stake in such cases and is entitled to compensation is an important one for the future.

As in FY 1976, one of the greatest commitments of division resources went to negotiation of consent decrees in five cases seeking improvement in the conditions and treatment in state institutions for the mentally retarded. Five lawyers in the Bureau have had responsibility for these cases. During FY 1976 interim consent decrees were reached at Fernald, Wrentham and Dever. These agreements call for a substantial increase in the personnel providing direct care to the patients. They also outline a continuing process of capital improvement that will significantly enhance the living conditions of patients at the institutions. In addition, supplemental decrees were issued with respect to the Belchertown School and the Monson School.

In addition to the cases cited, the Bureau also committed significant amounts of time to (1) upholding the constitutionality of a statute requiring binding arbitration and collective bargaining concerning police and firefighters, (2) engaging in extended litigation, including proceedings in the federal bankruptcy court, district court and court of appeals to thwart an attempt to utilize the bankruptcy process to override the state's regulation of liquor licenses in Boston, (3) arguing before the United States Supreme Court to uphold a statute which limited the taking of fish in Vineyard Sound to Massachusetts residents, (4) arguing before a three-judge federal court on behalf of a statute suspending the driver's license of anyone arrested for drunkeness who refused to take a breathalyzer test.

The primary administrative development of the year was the success of a new system for liquidating cases. Six-month case inventories, prepared by each lawyer, are expected to show a significant number of closed cases. The objective is to rid the office — and the commonwealth — of old, moot, frivolous, or otherwise terminable cases. During FY 1977, the Division closed out 511 cases. The campaign which began in the final quarter of FY 1976, accelerated throughout the year. As of the first quarter of FY 1978 (July through September of 1977) the rate of case closing had for the first time overtaken the rate of new cases. During that time our lawyers closed 153 cases as 138 new ones arrived. Our hope for the end of the Attorney General's first term is to have drained off old cases, leaving the offices with the important lawsuits which deserve our attention.

B. *AFFIRMATIVE LITIGATION*

The Government Bureau accelerated its affirmative litigation activities during its second year of operation. These activities include suits against both the federal government and private parties, particularly in the human services area.

The most significant affirmative case was brought against the federal government for $142,000,000 owed to Massachusetts by HEW for social service expenditures dating back to 1971. In December, 1976, Government

Bureau attorneys made a substantial submission of briefs, affidavits and other documents to HEW in support of the commonwealth's position. By the spring of 1977 the new federal administration was considering settlement of the action, to avoid defending against our suit.

Another important case, also involving federal reimbursement, challenged HEW's decision in June to withhold $10,000,000 for Massachusetts' alleged failure to adhere to the utilization review provisions of the Medicaid program. The Government Bureau obtained a temporary restraining order in federal court preventing the cutoff. The case, *Massachusetts* v. *Califano,* ultimately was mooted out by congressional action, thereby saving the state from any loss of reimbursement.

The case of *Massachusetts* v. *United States* addressed the issue of whether a federal tax on a state police helicopter violated the principle of intergovernmental tax immunity — the Government Bureau claimed the state was exempt from the tax. The First Circuit Court of Appeals held against the Commonwealth. In June, 1977, the Supreme Court agreed to hear the case.

Finally, a number of major affirmative cases were successfully brought to completion. *American Medical Association* v. *Mathews and Massachusetts* was a challenge by the AMA to the federal regulation which set maximum allowable cost limitations on drugs which are reimbursable by the federal and state governments under the medicaid program. Massachusetts intervened in order to support HEW's authority to promulgate such a regulation. The federal district court sustained the regulatory scheme in a thorough opinion which made clear that legitimate government cost-saving devices do not interfere with the practice of medicine.

Massachusetts obtained a preliminary injunction in *Trump* v. *Butz,* a suit brought by a number of private parties and states against the U.S. Department of Agriculture for their $1.2 billion reduction in food stamps. The case was then dismissed in April, 1977, when the new administration withdrew the challenged regulations. Similarly, the state prevailed in *Durham and Massachusetts* v. *Butz,* a case contesting the impoundment of approximately $650 million of federal funds for states under the supplemental food program for women, infants and children. This case terminated when the federal government decided during the year not to appeal.

There was also affirmative litigation in federal court against private parties. For example, a complaint was filed against the owners of the Argo Merchant, as a result of a major oil spill off the coast of Massachusetts. Another case involved a claim against federal savings and loan associations in the Massachusetts District Court that they follow state law requiring interest be given homeowners on mortgage escrow accounts.

Significantly, the affirmative litigation division increased its litigation in the state courts during the year. The division filed cases in the areas of education, community residences for mentally retarded persons, health, welfare and children's services.

In the area of education, a major suit was filed against the city of Chicopee, alleging massive and widespread violations of Chapter 766, the

state special education statute. The Government Bureau also intervened in a suit against the Boston School Committee for violations of c. 766. The Attorney General's suit against Springfield involving the issue of whether c. 766 violates the anti-aid amendment, moved closer to resolution in the Supreme Judicial Court. Other education suits included a case brought against the School Committee of Norwood to obtain compliance with the statute providing that children are entitled to publicly-supported education in the town where they reside and a complaint against the town of Swansea for interfering with the fiscal autonomy of the school committee reducing its budget. The latter two cases were successfully completed during the year.

One area of particular interest concerned lawsuits assisting the state Department of Mental Health to pursue its development of community-based facilities. The Department has determined that mentally retarded persons will be best served by transfer from state institutions to community residences. Government bureau attorneys intervened in a number of Superior Court cases to uphold the statutory exemption of community residences from local zoning laws, since they serve an "educational use" as defined by the state zoning enabling act. In all such cases, the court agreed with the Attorney General's position. Bureau attorneys, on behalf of the Department of Mental Health, also filed *amicus curiae* briefs on the same issue in the Massachusetts Appeals Court.

The area of health regulation continued to spawn litigation. Suit was brought on behalf of the Commonwealth against Revere Hospital, as a result of non-compliance with hospital licensure laws and regulations. In addition, the Government Bureau filed suits for the Rate Setting Commission against the New England Medical Center Hospital for violation of the new hospital cost control statute. On behalf of the Department of Public Welfare, a suit was brought seeking receivership of a nursing home to protect patients. Also, suits were filed seeking recovery of over-payments to a nursing home operator and for non-compliance with rate setting commission regulations.

Finally, in the area of children's services, four separate cases were successfully brought on behalf of the Office of Children to seek compliance with licensing statutes and regulations relating to family day care facilities.

C. *OPINIONS OF THE ATTORNEY GENERAL*

The Attorney General issues formal legal opinions to (a) state agencies and officials; (b) the Governor; and, (c) either branch of the general court or legislative committees in regard to pending legislation. Opinion requests range from those affecting a small number of people to issues of state-wide significance. In each instance, however, the Attorney General is asked to perform a quasi-judicial function and to exercise his independent legal judgment. This process has been strengthened during the past fiscal year through an intensified effort to screen out unnecessary or inappropriate opinion requests.

During Fiscal Year 1977, the Department of the Attorney General rendered 39 Formal Opinions. During this same period, over 100 inapprop-

riate requests for opinions were declined. For example, many requests came from persons not legally entitled to receive an Opinion from the Attorney General. Similarly, a number of requests were hypothetical in nature or related to ongoing litigation.

Of the 39 formal opinions issued during FY 1977, four were issued in response to requests emanating from the Legislature. These included a request from the President of the State Senate regarding whether the Commissioner of Public Welfare was authorized to expend funds or incur obligations for the Medicaid Program in excess of the amount appropriated by the Legislature. The Attorney General concluded that the Legislature is specifically vested with control over state expenditures and that when the total appropriated amount has been expended or committed, all further expenditures must cease until the Legislature has appropriated additional funds. Another request by the Legislature asked whether it was constitutional to restrict the use of certain lanes on the Southeast Expressway to cars with four or more passengers. The Attorney General found that restriction to be an appropriate exercise of the Commonwealth's Police power.

Growing interest in the areas of public records and privacy prompted two opinions of the Attorney General. In one the Attorney General addressed the extent to which a professional board of registration must permit public access to personal data contained in their files. The Attorney General construed the statutory public records definition to permit access to names, educational and professional backgrounds, addresses and registration numbers of licensees, but to bar access to age, marital status and other similar personal data. In a second opinion the Civil Service Commission inquired as to the public record status of pending charges and evidence. The opinion holds that pending charges are public records unless disclosure would constitute an invasion of personal privacy.

In an area closely related to privacy and public records, the Attorney General considered the validity of the University of Massachusetts Board of Trustees holding executive sessions for certain specified purposes. Based on its interpretation of state law creating the Trustees, the Attorney General found the action valid notwithstanding the more general provisions of the state open meeting law.

Another important set of Attorney General Opinions addressed election problems. One opinion clarified the function of the Director of the Office of Campaign and Political Finance; another confirmed that election officials must count "sticker" votes with a pre-printed "X" on them and sticker votes which have been improperly affixed to the ballot.

Three opinions were issued in the area of corrections, including one in which the Attorney General found that the state Parole Board's jurisdiction extends to all prisoners eligible for parole, regardless of the type of sentence (e.g., aggregated, weekend, or split sentences) being served.

Another major category of opinions pertained to the retirement law. Subjects addressed by the Attorney General in four retirement opinions included mandatory retirement, survivor benefits, and the authority of the

Federal Internal Revenue Service to issue a tax levy on a state retirement allowance.

Other significant opinions included one upholding the right of school teachers to refuse to lead and participate in the pledge of allegiance; another defined the scope of the state small business purchasing program; and a third defined how municipalities may spend and encumber funds granted to them under the Massachusetts Clean Waters Act.

Finally, one of the most significant aspects of the Opinion Process during the past year was the initiation of the Opinion Digest. The Digest, published three times each year, summarizes the highlights of each of the opinions issued during the prior four month period. It is sent to state and municipal officials as well as to county and university law libraries.

Conflicts of Interest

Under G.L. c. 268A, §10, the Attorney General is directed to issue conflict of interest opinions to state employees and officials when requested. During this fiscal year, 61 formal conflict of interest opinions were issued. These opinions evaluated the factual information surrounding the conflict statute, G.L. c. 268A, §1 *et seq.* While often the factual circumstances are such that the opinion is useful only as guidance for the individual making the request, the Attorney General has frequently written the conflict opinions so as to provide general guidance to other similarly situated employees. For example, the Attorney General issued several opinions regarding the propriety of state employees taking additional positions as part-time instructors at state colleges.

D. *BY-LAWS*

The Government Bureau reviews all town by-laws after they are enacted, to determine that they conform to statutory and constitutional requirements. Two types of by-laws are reviewed: zoning by-laws, enacted by a two-thirds vote; and general by-laws, enacted by a majority vote to deal with the general police power of the community or special subjects authorized by statute or by the Home Rule Amendment. The Home Rule Charter actions of all cities and towns are also reviewed.

During the fiscal year 1977, 1200 by-law submissions were received. Specifically, 548 dealt with zoning. The disapproval rate in total or in part ran about four percent. There were two charters and fourteen charter amendments and two historic by-laws reviewed.

Wetlands regulations to meet the U.S. Department of Housing and Urban Development requirements to qualify for flood plain insurance continued to be numerous.

There were over twenty-five complete zoning by-law enactments as a result of the passage of Chapter 808 of 1975 (New Zoning Act). This activity should increase in fiscal 1978.

Activity continued in two fields of local police power: drinking in public places and canine control by-laws.

Inquiries from the field indicate that there have been a remarkable number of town committees formed to re-write various towns' general by-laws completely in fiscal 1978.

E. *COUNSELING TO STATE AGENCIES*

In addition to the major responsibilities described above the Government Bureau also counsels 30 boards of professional registration in the performance of statutory duties to license, regulate and discipline the members of the professions. The average attorney advises two boards on their administrative rulemaking and adjudication and represents them in all court proceedings as well.

This counseling function extends to all state clients needing guidance on questions likely to generate litigation. The Bureau is especially available to bodies lacking house counsel, and will assist others on serious matters when they have exhausted the resources of their own attorneys. The objective is to obviate litigation wherever possible and to prevent administrative error. In particular, a number of boards of registration have adopted the Rules of Adjudicative Procedure drafted by the Government Bureau in an effort to improve the hearings process and make them uniform from board to board.

F. *INTERNAL MANAGEMENT*

The Bureau has strengthened and enlarged many of the management systems established in 1975. Each attorney receives and maintains a standardized *Office Manual* describing the principles of work assignment, case file maintenance, trial book assembly, periodic case loan reporting, law and form file systems, and client relationships with state government. The Law File system presently numbers approximately 170 briefs, memoranda and decisions of recurrent usefulness; the Form file system includes about 150 model court papers and correspondence formats.

Currently, the Bureau is installing all its cases and most of its important work products in the Department's computer system.

G. *THE CLINICAL PROGRAM*

The Bureau continued its successful relationship with Boston College Law School. Fifteen third-year Boston College Law School students participated in the Attorney General's Clinical Program in the Government Bureau. The students assisted in all phases of litigation and generated a substantial work product, including a number of excellent — and winning — briefs. Bureau attorneys served as instructors both in the daily campaign of particular cases and in formal seminar sessions which taught pleading, discovery practice, motion practice, appellate argument, trial preparation, negotiation, as well as substantive issues of special importance.

V. PUBLIC PROTECTION BUREAU

CIVIL RIGHTS AND LIBERTIES DIVISION

A. *INTRODUCTION*

The Civil Rights and Liberties Division, established by G.L. c. 12, §11A, is one of the five Divisions within the Public Protection Bureau of the Department of the Attorney General. The Division operates to protect the

civil rights and civil liberties of citizens in the Commonwealth. Specifically, the Division initiates affirmative litigation on behalf of citizens, citizen groups, agencies and departments of the Commonwealth in matters involving constitutional protections, and defends government agencies in cases which raise constitutional issues. In addition, staff of the Division advise the Attorney General of developments and issues in the area of civil rights, draft legislation, comment on agency regulation and investigate complaints of violations of civil rights brought to the attention of the Division by citizens of the Commonwealth. Finally, the Division is given the authority pursuant to the provisions of G.L. c. 151B, §5 to initiate complaints before the Massachusetts Commission Against Discrimination (MCAD) and to represent that agency before trial and appellate courts when judicial review of MCAD decisions is sought.

The Division is presently staffed by a Chief, four Assistant Attorneys General, one of whom directs the Women's Rights Unit and another of whom heads a Privacy and Public Records Section, and appropriate support personnel, including para-professionals who staff a citizen complaint unit. In addition, two Special Assistant Attorneys General are located physically within the Division and are available for specific case assignments in areas consistent with their expertise. One of these Special Assistant Attorneys General serves as counsel to the Criminal History Systems Board. The other serves as counsel to the Security and Privacy Council.

B. *DESCRIPTION OF ACTIVITIES*

Through Fiscal Year 1977, the activities of the Division were catalogued according to the nature of the Division's involvement in any one of several areas involving the protection of civil rights and civil liberties.

Activity on the part of Division attorneys generally took the form of litigation, non-litigation activity, or affirmative action. Cases in litigation were those cases in which a Division attorney represented a plaintiff or a defendant in a legal cause of action before a court or an administrative hearing. Non-litigation activities included cases disposed of through preliminary negotiations, or activities not of a litigation nature, such as the drafting of legislation or position papers. Affirmative actions generally involved lawsuits or administrative matters initiated by the Division in response to perceived patterns and practices of discrimination. Such patterns were generally found to exist following self-initiated investigations or were brought to the Division's attention through citizens' complaints.

Matters in which staff of the Division were involved, either through litigation or non-litigation, occurred in the following areas:

Equal Educational Opportunities
Correctional/Youth Services
Employment Discrimination
Privacy Matters
Matters Involving Public Records
Health Matters
Discrimination Again Physically Handicapped

Age Discrimination
Problems Involving Migrant Laborers
Discrimination Against Developmentally Disabled
Issues Involving Women's Rights
Housing Discrimination

A representative description of cases in each of the several areas of involvement follows.

1. EDUCATION

Department of Education v. New Bedford School Committee. On behalf of the Commissioner of the Department of Education, we brought an administrative action against the New Bedford School Committee for failure to implement M.G.L. c. 71A, the Transitional Bilingual Education Act. The suit's objective was to ensure that every student within the New Bedford School system had access to education in his or her dominant language, as required by law.

The case is currently in the remedy stage, with the parties attempting to design and implement a bilingual program which will fully comply with state law.

Morgan v. Kerrigan. The Division continues to represent the State Board of Education in the implementation of Phase II and Phase IIB of the United States District Court's decision and order requiring the establishment of a unified school system in the City of Boston.

Commissioner of Education v. Berkshire Hills Regional School Committee. We represented the Commissioner of Education in this case initiated against the members of the school committee of the Berkshire Hills Regional School District and the Commissioner of the Department of Welfare to compel the school committee to permit a handicapped foster child to attend school in the town of his foster parents. In addition, we sought to compel the Department of Public Welfare to seek appropriation for the funding of school costs of children placed with foster homes in cities other than that of their natural parent. The case was settled after the Governor sought a $2.5 million appropriation to fund implementation of G.L. c. 76, §7.

2. CORRECTIONS/YOUTH SERVICES

Inmates of the John Connally Detention Center v. Dukakis. Youths incarcerated at the Department of Youth Services Detention Center in Roslindale brought a class action suit against the Department of Youth Services alleging that unconstitutional conditions existed at the Detention Center. After numerous hearings, at which we represented the state defendants, the parties were able to negotiate a consent decree which remedied the alleged abuses and which also provided the Commonwealth with the flexibility necessary to administer the detention center.

3. EMPLOYMENT

Wheelock College v. Massachusetts Commission Against Discrimination. In FY 1977, the Supreme Judicial Court issued a decision in the Wheelock

College case, a suit which had alleged discrimination in employment based on sex. The MCAD had found discrimination to have existed in hiring and promotion practices. The SJC reversed and remanded the Commission decision. In so doing, the SJC set the standard for establishing discrimination in employment, following closely the principles established in *McDonald Douglas Corporation v. Green*, 411 U.S. 792 (1973).

Massachusetts Commission Against Discrimination v. Liberty Mutual Insurance Company. In FY 1977, the Supreme Judicial Court issued a decision in the Liberty Mutual Insurance Company case, a case alleging discrimination in employment based on sex. In this decision, the SJC decided that the Massachusetts Commission Against Discrimination has the power to issue a subpoena duces tecum for the production of books and records during an investigation and before a finding of probable cause.

Bournewood Hospital v. Massachusetts Commission Against Discrimination. In FY 1977, the Supreme Judicial Court issued a decision in the Bournewood Hospital case, a case alleging discrimination in employment based on sex. In its decision, the Supreme Judicial Court reversed the decision of a Superior Court judge who had set aside an award for emotional distress, pain and suffering awarded by the MCAD. The Supreme Judicial Court held that G.L. c. 151B. §5 empowered the Commission to award punitive damages. The Court also held that c. 151B. §5, does not grant the MCAD the power to award counsel fees and affirmed the Superior Court ruling denying such fees.

Massachusetts Commission Against Discrimination v. Cambridge Housing Authority. In this case, the Division represented a complainant before the MCAD in an employment discrimination case. The Division successfully settled the claim for $35,000.00 in back pay, including an award of damages for humiliation, pain and suffering on the basis of *Bournewood Hospital.*

Bradley v. Wiggins and *Smith v. Wiggins.* In these two complaints, plaintiffs sought protective status for provisional firefighters hired during the pendency of *NAACP v. Beecher.* We successfully filed motions for judgment on the pleadings in each case.

Bellotti v. Allyn and Bacon, Addison-Wesley and Houghton Mifflin. These are three employment cases alleging that publishing companies discriminate in their employment practices on the basis of sex and race. After receiving right to sue letters from the Equal Employment Opportunity Commission, the cases were filed in the United State District Court. Extensive discovery is now in progress.

Garden, et al. v. Houghton Mifflin. On behalf of the Attorney General, we intervened in this case alleging sex-based employment discrimination in the publishing industry. The case has proceeded through extensive discovery and negotiations toward a possible settlement are proceeding.

Commonwealth v. Waltham Police. Pursuant to its authority under c. 151B, §5, the Division brought a complaint before the Massachusetts Commission Against Discrimination alleging that the hiring practices of the Waltham Police Department discriminated against minorities. After con-

siderable negotiation, the city made an acceptable offer for settlement in which it agreed to increase substantially its number of minority police officers.

Smith College v. Massachusetts Commission Against Discrimination. In FY 1977, we represented the Massachusetts Commission Against Discrimination in an appeal of a Commission Order finding discrimination against women in the granting of tenure at the College. Our appeal to the Supreme Judicial Court is pending.

4. PRIVACY

Police Commissioner of Boston v. The Municipal Court of the Dorchester District. The Division is representing the Defendant Justice whose order for the expungement of a juvenile's arrest record is being challenged in the Supreme Judicial Court. The case was argued in the Supreme Judicial Court during the fiscal year and a decision is being awaited.

Commonwealth v. Credit Bureau of Nashua, Inc. The Division commenced negotiations with the Credit Bureau of Nashua, Inc., pursuant to G.L. c. 93A, for attempting to coerce its customers into buying back credit reports with the threat of selling those reports to a computerized agency. During the fiscal year, the Division agreed to accept an Assurance of Discontinuance that the Credit Bureau would cease the practice complained of, and would refund all monies collected.

Police Commissioner of Quincy v. The District Court of East Norfolk. This case was initiated in the Supreme Judicial Court for Suffolk County in February, 1977, by the Chief of Police of Quincy. The complaint challenges the validity of an Order in Quincy District Court for the expungement of the records of an adult defendant found not guilty in a case of mistaken identity.

5. PUBLIC RECORDS

Addison-Wesley Publishing Company v. Rumsfeld. The plaintiff in this case brought a "reverse freedom of information act" suit to prevent the federal government from releasing affirmative action plans and standard contract review reports to a United States agency. The information had been sought to substantiate our claims of sex discrimination in employment. We intervened and filed an Answer. The United States District Court denied the plaintiff's request for a temporary restraining order. That denial was appealed to the United States Court of Appeals which ordered the District Court to give a statement of reason for its denial of the temporary restraining order. As a result of the decision by the United States Court of Appeals, the Defense Supply Agency has released the information we sought.

Dennis-Yarmouth Regional School District v. Selectmen of Dennis. This case was initiated in January, 1977, as a "reverse" public records case in which the Dennis-Yarmouth Regional School Committee sued the Dennis Selectmen to prevent the publication of the names and salaries of employees of the school district in that town's annual report. We intervened as a defendant and counterclaimed under the amended Public Records

Law, Chapter 438 of the Acts of 1976. In our counterclaim, we sought relief making available to the public the names, salaries, and home addresses of such employees. That information had originally been sought by one of the Cape newspapers. The Dennis-Yarmouth Teachers Association intervened on the side of the school district. The Cape and Island Press Association filed a brief *amicus curiae* on our behalf. All parties stipulated to the facts and moved for judgment on the pleadings. The case was argued in Barnstable Superior Court. The Superior Court issued an opinion supporting our position that the records sought are public records.

Attorney General v. School Committee of Northampton. This action was commenced on behalf of the Attorney General in the Superior Court of Hampshire County. The local newspaper had sought the names and addresses of all applicants for the position of Superintendent of Schools in Northampton. The School Committee refused to make such list available and also refused to print the names of 16 semi-final candidates and the minutes of a subcommittee meeting. The newspaper appealed to the Supervisor of Public Records. The Supervisor declared the list to be a public list and ordered its release. When the School Committee refused, the Supervisor asked the Attorney General to initiate this action pursuant to the amended G.L. c. 66, §10(b) and the Open Meeting Law. After argument, the Superior Court found a violation of the Open Meeting Law and held that the privacy exemption might protect the records of the non-semi-finalists. The Defendant has appealed.

Hastings Sons Publishing Company v. Police Commissioner of Lynn. This case involves an appeal from a Superior Court decision which held that base salary and overtime paid to police officers are subject to disclosure pursuant to the Public Records Law. We have filed an *amicus curiae* brief in the Appeals Court urging affirmance of the Superior Court decision.

D'Attilio v. President and Fellows of Harvard College. In this case we represented the Supervisor of Public Records relative to whether the records of the Governor's Special Commission considering the Sacco and Vanzetti pardon (the Lowell Commission) are public records. The records are presently housed in the Harvard Archives under a promise that they not be made public until December 9, 1977. We moved to dismiss the complaint on the grounds that the Supervisor of Public Records is not a proper party.

Cunningham v. Housing Inspector of Chelsea. We filed an *amicus curiae* brief in the Appeals Court urging reversal of a Superior Court determination that housing inspection reports are not public records. We argued that specific statutory provisions make the records public and, even in their absence, no exemption to the public records law would exempt housing inspection reports from public disclosure.

6. HEALTH

Department of Public Health v. Sheriff of Plymouth County. In FY 1977, we filed suit on behalf of the Department of Public Health against the Sheriff of Plymouth County after the Department's investigation revealed

that the Sheriff was violating provisions of G.L. c. 127, §§16 and 17. That statute requires county jailers to give complete physical examinations to inmates committed for more than 30 days and to keep complete medical records.

7. PHYSICALLY HANDICAPPED

Architectural Barriers Board v. Selectmen of Burlington. At the request of the Architectural Barriers Board, we filed suit against the Town of Burlington to enforce state laws prohibiting towns from building sidewalks and curbs without "curb cuts" to make them accessible to the physically handicapped.

8. AGE

Frietchie v. Dukakis. This case concerned a challenge to the procedures of the Department of Elder Affairs for implementing a home care program under Title XX of the Social Security Act. The Division worked with the Department to draft regulations on privacy of personal data and procedures on handling of appeals. At the close of the fiscal year, the case was still pending, but the new regulations had rendered many of the issues moot.

9. MIGRANT LABOR

Consolidated Cigar Corporation v. Department of Public Health. This case involved a challenge to the validity of the statute and regulations in Massachusetts which require growers to permit access to migrant labor camps. The Division defended the action and counterclaimed for enforcement of the statute. The plaintiff admitted violation of the statute and regulation with regard to its camps for adolescent workers in the Connecticut River Valley. During the fiscal year, the Division prepared and argued the company's appeal from the Superior Court decision favorable to the Department. The Supreme Judicial Court upheld the validity of the statute and regulations.

10. DEVELOPMENTALLY DISABLED

Superintendent of Belchertown State School v. Saikewicz. Defendant in this case is a 67 year old retarded resident of a state school for the mentally retarded. He was found to have acute terminal leukemia and was given only months to live. Following the recommendation of a guardian *ad litem* appointed by the Probate Court, a probate judge ordered that chemotherapy treatment not be administered because the toxic side effects of the disease would outweigh any benefits. The judge concluded that such treatment would have serious debilitating consequences for the patient, might prolong his life for a short time but would not cure him of the disease, and would cause severe pain and suffering for the patient. On petition to the Supreme Judicial Court, the order of the Probate Court was upheld in a case in which the Division filed an *amicus* brief supporting the guardian. Another bureau of the Department represented the petitioning superintendent. The Court issued an order sustaining the Division's

position and indicating that a full Opinion would follow. The Division filed a supplemental brief recommending procedures for the handling of similar cases in the future.

Ricci v. Greenblatt. In conjunction with attorneys from the Governmental Bureau, we are representing the Department of Mental Health and other state Defendants in this suit challenging the conditions of a facility and the nature of care provided to mentally retarded residents at the Belchertown State School as well as at four other state institutions for the mentally retarded. Recent efforts have concentrated on the implementation of the Consent Decree entered into in November, 1973, and on the continuation of the transition from an institution-based to a community-based delivery system.

11. WOMEN'S RIGHTS

Secretary of State v. City Clerk of Lowell. The complaint in this case, filed in the Supreme Judicial Court for Suffolk County, challenged certain practices of all city and town clerks in the recording of names. The case concerned the manner in which the clerks interfered with the statutory and constitutional responsibilities of state officials with respect to public records by refusing to record names of choice. The second cause of action concerned the adverse effect of the clerk's action on citizens of the Commonwealth. The parties filed stipulations of fact and the case was reserved and reported to the full bench. The case was argued before the Supreme Judicial Court during the fiscal year, and is awaiting decision.

C. *REPRESENTATIVE DESCRIPTION OF NON-LITIGATION ACTIVITY*

Following an extensive investigation, the Division submitted a report and recommendation to the Commissioner of Youth Services, Commissioner of the Department of Public Welfare, and the Director of the Office for Children relating to allegations of mistreatment on the part of the staff at Hyde Park House, Inc. The report found that allegations of fact concerning mistreatment of children were substantiated in certain cases, that the benefit of concept-type modality for the treatment of juveniles was questionable, and that, in any event, the state agencies did not require sufficient recordkeeping and reporting on the part of the provider. The report recommended that the Office for Children institute license revocation proceedings against Hyde Park House, Inc. In addition, the report recommended that the state agencies implement recordkeeping procedures for monitoring intrusive modality-oriented programs.

An attorney from this Division helped lead seminars for MDC lifeguards from Roxbury and South Boston to assist them in dealing with racial incidents which may occur at MDC facilities.

Through negotiations with representatives of the First National Bank, we have reached an agreement in which the bank will no longer process letters of credit containing certification that no Israeli materials are being shipped pursuant to the letter.

As a result of negotiation on the part of a Division attorney, Equifax Services, the nation's largest consumer credit reporting agency, has agreed to make available to Massachusetts' citizens all information it holds concerning them. This negotiation followed receipt of several complaints by citizens to the effect that they had been denied access to personal information collected by Equifax.

A Division attorney participated in the development of regulations for the proposed women's intensive care unit of the Worcester State Hospital. The intensive care unit is a new, experimental program and has the potential of being used by persons within the criminal justice system as a convenient place to house women who are categorized as trouble-makers.

Boston State College Investigation. Attorneys in the Division participated in an investigation of allegations that the private security force employed by Boston State College engaged in illegal surveillance of students and faculty. We recommended dismissal of the private contractor and direct employment of a security force. The College accepted our recommendation.

Maternity Leave. Four hundred letters were mailed to the larger employers in the Commonwealth regarding maternity leave benefits and statutory requirements that notice concerning maternity leave benefits must be posted. We are now engaged in an ongoing monitoring of responses received from those letters with the possibility that litigation may be necessary in the future to achieve full compliance with maternity leave regulations.

Hospital Records. In FY 1977, we received numerous complaints from persons alleging that hospitals were charging excessive amounts of money for their patients' records in violation of G.L. c. 111, §70. We have written to those hospitals complained against and each of them has agreed to comply with the statute. To date, we have received compliance from over 30 hospitals.

Redlining in the Provision of Services. In November, 1974, we began negotiations with the General Electric Company to insure provision of services to particular areas of Boston by General Electric. Those negotiations were concluded in November, 1976, with General Electric agreeing to provide service to persons purchasing their product, either through the use of minority employees they have hired as a result of our negotiation, or through the use of minority subcontractors.

Co-Re Realty, Inc. During the month of July, we received several complaints concerning an advertisement placed in a local newspaper by Co-Re Realty, Inc., which noted that, in the areas served by Co-Re (Burlington, Melrose, Medford, etc.) there was "No Busing Here". We advised Co-Re that such advertisement appeared to be in violation of the housing laws. We have received a reply from Co-Re advising us that they will no longer use the challenged phrase in their advertisement.

Hyde Park Blockbusting. In April of 1977, we received several complaints from citizens and from citizen groups that realtors in the Hyde Park area of Boston were engaging in blockbusting and steering tactics in the

sale of real estate. Following an investigation, we notified seven realtors of our findings that they were engaging in unpermitted conduct, and requested that such conduct be discontinued. As a result, all such actions have ceased.

CONSUMER PROTECTION DIVISION

A. *INTRODUCTION*

The activities of the Consumer Protection Division continue to increase. The combined efforts and coordination of the attorneys, investigators, utilities and complaint sections, enable us to approach with expertise problems of a consumer oriented nature occurring throughout the state. All resources are utilized in an attempt to better educate both the consumer and businessman of their rights in the marketplace.

B. *REGULATIONS*

All regulations promulgated by our office are drafted with the assistance of advisory committees appointed by the Attorney General whose members are made up of professionals with expertise in the area of drafting consumer regulations.

Automobile

All sections of the automobile regulations are now in effect and for the first time provide firm rules governing all aspects of the automobile industry. On two separate occasions, the Massachusetts Automobile Dealer's Association challenged these regulations in an attempt to stay their implementation, and each time they were unsuccessful.

Since automobile problems make up the largest single category of consumer complaints received we have drafted a layman's version of these regulations to assist the consumers of the Commonwealth in all aspects of automobile sales, service, and manufacturer's responsibilities.

Advertising

Public hearings were held in Springfield and Boston on the 5th draft of the Retail Advertising Regulations and the final version will be completed in September. These regulations which we hope will become effective sometime in October, would govern all aspects of commercial sales promotions excluding automobiles (which are exclusively covered in the Motor Vehicle Regulations).

Debt Collection

The third draft of the debt collection regulations has been completed. Public hearings are expected to be held in mid-winter, 1978.

Nursing Home

The nursing home regulations were promulgated on November 11, 1975. We continue to monitor all aspects of these regulations for compliance in all nursing homes throughout the Commonwealth.

C. *INVESTIGATIONS*

We have been involved in many investigations during the last twelve months. In August of 1976, we began our in-depth survey of the funeral industry which involved contacting over 950 funeral establishments in

Massachusetts. This survey was undertaken in an attempt to better understand the funeral industry in Massachusetts and provide invaluable information to consumers. After collecting data from these funeral homes covering all aspects of their operating procedures, a report was issued in March with the Attorney General's recommendations which, if put into effect, would give the consumer more options in planning funerals.

Our investigators are also continuing a multi-level investigation of the automobile industry checking for compliance with our recently promulgated motor vehicle regulations, monitoring advertising and checking for odometer violations. This investigation requires an on-the-spot visit to every new and usd car dealer in the state. Questionnaires are filled out and the information is then reviewed by an attorney who forwards a warning letter to any dealer determined to be in violation of the law. If proper actions to correct the situation are not undertaken, lawsuits are initiated.

D. *ECONOMIC CRIME PROGRAM*

In the latter part of 1976, we developed an economic crime program in connection with the Attorney General's Criminal Bureau. The program consists of four parts:

(1) Establishment of an informational network; (2) Public Education; (3) Litigation; and (4) Legislative Reform.

All police chiefs and district attorneys in the state were invited to a meeting at which the Attorney General announced that this program would become operational on January 1, 1977. He asked each police department to name a liaison to work with us. Of the 351 cities and towns throughout the Commonwealth, 95% to date have designated an economic crime liaison to work directly with our office.

Two Consumer Fraud Conferences were held in April, one in Holyoke and the other in Framingham, at which representatives from various police departments throughout the state attended. These conferences included sessions on both civil and criminal approaches to economic crime.

The core of the economic crime program, however, is criminal prosecution of offenders. We have successfully indicted seven (7) Springfield area automobile dealers of which three (3) were convicted of larceny in connection with odometer spinning. In addition, we have indicted one (1) individual in regard to the illegal promotion of business opportunity schemes.

E. *CONSUMER EDUCATION*

As part of Attorney General Bellotti's effort against white-collar crime, a public awareness program has been developed in conjunction with Boston University's Ad Lab. It consists of public service announcements on radio, television, and in public transit vehicles warning consumers of common pitfalls they may encounter at the marketplace. Pamphlets entitled "If It Sounds Too Good To Be True, It Probably Isn't", have been distributed to every police department and local consumer group throughout the Commonwealth.

F. *COMPLAINT SECTION*

The number of consumer complaints continued to increase this year. During FY 1977, 12,846 consumer complaints were received and recorded in the Complaint Section of the Consumer Protection Division, and 11,201 were closed. The number of new complaints received this year constituted a 10% increase over last year. In addition, approximately 3,500 consumer complaints were referred to various state agencies and the local consumer groups.

As a result of the combined efforts of the many college students, law students, and elderly persons working in our Complaint Section, we have recovered $407,893.00 in refunds, savings, and value of goods or services received by consumers.

G. *LOCAL CONSUMER GROUPS*

The 30 local consumer groups in the state have continued to work in conjunction with our office accepting referrals as well as referring to us unlawful business practices for review and possible legal action.

These groups meet each month with us in Boston. These meetings afford them the opportunity to exchange ideas and gather additional information about current consumer issues.

Attorney General Francis X. Bellotti filed legislation in 1977 which established a fund to provide financial assistance to local consumer groups throughout the state. An Advisory Committee will be named in August to assist the Attorney General in preparing appropriate guidelines.

H. *LITIGATION*

All legal actions are categorized by subject, name of defendant, current status and jurisdiction. Note: all cases were entered or heard in superior court, unless otherwise designated.

I. *ADVERTISING*

Stephen Guarino, d/b/a Kitchen Delight	In Litigation	Suffolk
Hyannis Hi-Fi, d/b/a Nantucket Sound	Assurance of Discontinuance	Barnstable
Arkay Electronics Corp.	Assurance of Discontinuance	Suffolk
Artistic Typing Hdqtrs.	Assurance of Discontinuance	Suffolk
A & W Electronics	Assurance of Discontinuance	Suffolk
B & G Industries	In Litigation	Norfolk
Bromfield Camera, Inc.	Assurance of Discontinuance	Suffolk
Mansfield Mattress Co. d/b/a Comfort Corner	Assurance of Discontinuance	Suffolk
Cuomo's Audio	Assurance of Discontinuance	Suffolk
Pickwick International Corp. d/b/a Discount Records	Consent Judgment	Suffolk
Eclipse Sleep Proucts	Assurance of Discontinuance	Suffolk
Ed's Radio	Assurance of Discontinuance	Suffolk
Graham Radio, Inc.	Assurance of Discontinuance	Suffolk
Lane's Furniture	On Appeal	Suffolk

Lesnow Manufacturing Corp. and Hercules Trouser Co.	Assurance of Discontinuance	Suffolk
Universal Marketing Corp. d/b/a U.S. Marketing Associates	In Litigation	Norfolk
Jordan Marsh Co.	Assurance of Discontinuance	Suffolk
I.M.B.C. Inc. d/b/a Puppy Center	Consent Judgment	Hampden
Juno Inc. d/b/a Siesta Sleep Shop	Assurance of Discontinuance	Suffolk
Supreme Furniture d/b/a Summerfield's Furniture	Consent Judgment	Suffolk
Todd's World of Furniture	Assurance of Discontinuance	Suffolk
Richard Boisvert	In Litigation	Hampden
YDI Electronics Corp. d/b/a You Do it Electronics Hobby Center	Assurance of Discontinuance	Suffolk
Building #19	Assurance of Discontinuance	Suffolk
New England Photo	Assurance of Discontinuance	Suffolk
Anderson's Furniture	Consent Judgment	Essex
Massachusetts Camera Centers	Assurance of Discontinuance	Suffolk
National Business Association Directory	In Litigation	Suffolk
Sound II	Assurance of Discontinuance	Suffolk
People's Furniture	In Litigation	Middlesex
Joseph Parks and Perfect Nails a/k/a Figurenails Unlimited	In Litigation	Suffolk
Jack's Radio and TV	Consent Judgment	Essex
Smith's Division of Wolfe and Smith	Assurance of Discontinuance	Suffolk
Leonard B. Paul and Leslie Paul d/b/a Town & Country	Consent Judgment	Hampden
Edwards Wayside Furniture	In Litigation	Hampden

I. *APPLIANCE REPAIRS*

Paul Johnson, d/b/a Factory Heating Service	In Litigation	Middlesex
Ralph Rigione d/b/a AACME Power Vac Service	Consent Judgment	Suffolk
Paul E. Petit, d/b/a TV and Radio Center	In Litigation	Bristol
Audiosonics, Inc.	Assurance of Discontinuance	Middlesex
Kingsley Bristol d/b/a King Appliance Service	Consent Judgment	Suffolk
Timothy J. Rich, Jane Rich, and Air Temp Engineering Corp.	In Litigation	Middlesex

III. *AUTOMOBILES*

Autobarn Ltd.	In Receivership	Worcester
Anthony Famalette, d/b/a Westport Autorama	Consent Judgment	Bristol
Imported Cars of Cape Cod Inc.	Assurance of Discontinuance	Suffolk
Milton Motors, Inc., d/b/a Milton's Auto Sales	In Litigation	Hampden
Toyota of Falmouth	Assurance of Discontinuance	Barnstable
Volkswagen of America, Inc.	In Litigation	Middlesex

David Eck, d/b/a Eck's Auto Sales	In Litigation	Norfolk
George O'Neil d/b/a ACE Motors	In Litigation	Middlesex
Reuben Enterprises, Inc. a/b/a Bart's Auto Center	Consent Judgment	Worcester
Bonded Motors of Stoughton Inc., d/b/a Bonded Dodge	In Litigation	Norfolk
Bob Brest Buick, Inc.	On Appeal	Suffolk
Chalet Motor Sales	Assurance of Discontinuance	Norfolk
Edward J. Borlen, d/b/a City Auto Sales	Assurance of Discontinuance	Suffolk
Joe Cullinan Ford, Inc.	Consent Judgment	Middlesex
Dazell Volvo	Assurance of Discontinuance	Suffolk
Kevin Delaney, Inc.	Assurance of Discontinuance	Suffolk
William DeSautels	In Litigation	Bristol
General Motors Corp.	In Litigation	Suffolk
LeBert Brothers Lincoln/Mercury	Consent Judgment	Middlesex
Big Beacon Chevrolet	Assurance of Discontinuance	Suffolk
Massachusetts Automobile Dealers Association	In Litigation	S.J.C.
George O'Hara Chevrolet/Cadillac	Assurance of Discontinuance	Suffolk
Seacrest Cadillac Pontiac, Inc.	In Litigation	Essex
Kenneth T. Wasil, Michael Wasil	In Litigation	Suffolk
Wilmington Sales, Inc.	In Litigation	Middlesex
Taunton Sales	Assurance of Discontinuance	Suffolk
English Chevrolet	Consent Judgment	Suffolk
Abel Ford	In Litigation	Suffolk
Harry Silverman, Inc.	Assurance of Discontinuance	Suffolk

IV. *BANKING AND CREDIT*

Allied Bond and Collection Agency	In Litigation	U.S.D.C.
Chrysler Credit Corp.	Consent Judgment	Suffolk
Daniel Gaeta	Consent Judgment	Suffolk
Van Ru Credit Corp.	In Litigation	Suffolk
Enterprise Co-op Bank	In Litigation	Suffolk
New England Merchants Bank	In Litigation	Suffolk
Max Wasselman	Consent Judgment	Middlesex

V. *BANKRUPTCY*

Dante E. Gregorie	In Litigation	Bankruptcy
Guys & Gals	Settlement	Bankruptcy
Hamilton's Furniture	Settlement	Bankruptcy
R. B. Diggins	Settlement	Bankruptcy
H & H Furniture	In Receivership	Middlesex
Colonial Realty Investment Co., et alii, Consolidated Debtors	In Litigation	Bankruptcy

VI. *FOOD & ANTI-TRUST ACTIVITIES*

Datamarine International, Inc.	Consent Judgment	Barnstable
First National Stores, Inc.	Assurance of Discontinuance	Middlesex
The Great Atlantic and Pacific Tea Co., Inc.	Consent Judgment	Barnstable
Yankee Milk	In Litigation	Suffolk
Bulk Meat Co., d/b/a Holyoke Packing Co., Inc.	In Litigation	Hampden
Chala Foods, Inc. et al	Consent Judgment	Middlesex
Atlantic Richfield Co.	In Litigation	Suffolk
Julius Wilensky, d/b/a Orleans Coal & Oil Co.	Consent Judgment	Middlesex

VII. *HEALTH AND MEDICAL*

Phillip G. Gallagher, M.D.	Assurance of Discontinuance	Suffolk
Blue Cross of Massachusetts and Blue Shield of Massachusetts	In Litigation	Suffolk
Medical Home Care Services and Maurice Glennon	Consent Judgment	Hampden

VIII. *HEALTH SPAS*

Diversified Health Industries d/b/a Roman Health Spa	In Litigation	Norfolk
International Health Spa	In Litigation	S.J.C.
Mystic Health Club of Dedham	In Litigation	Middlesex

IX. *HEARING AIDS*

Dee & Mahoney, d/b/a Hearing Aid Service	In Litigation	Hampden
Louis F. Cercone, d/b/a Hearing Dynamics of New England	In Litigation	Norfolk
Beltone of Boston	Consent Judgment	Suffolk

X. *HOME IMPROVEMENTS*

Palandro, et al	In Litigation	Suffolk
Frank DePasquale, Individually and as he is d/b/a Hub Contracting Co.	In Litigation	Housing Court
Paul Sheridan, d/b/a Sherry Decorators	In Litigation	Suffolk
Charles R. Stott and Michael Ward, d/b/a Town & Country Roofing, Waltham Roofing Service, Beacon Hill Roofing and Skylight Service	In Litigation	Middlesex
John W. Jones, d/b/a Servall Constructing Co.	In Litigation	Middlesex
Thomas O'Connor, d/b/a O'Connor Bros.	In Litigation	Middlesex
Supreme Remodeling	In Litigation	Norfolk

XI. *LANDLORD-TENANT*

Donald E. Anchutz, d/b/a Golden Eagle Apartments	Assurance of Discontinuance	Suffolk
Henry M. Barry	Consent Judgment	Plymouth
Chawa Tash	Assurance of Discontinuance	Suffolk
Alfred L. Gladstone, d/b/a Ridgewood Realty	In Litigation	Middlesex
Gray Rental Properties	Assurance of Discontinuance	Suffolk
Peter Minicucci	In Litigation	Essex
Variety International Publications, Inc.	In Litigation	Hampden
Bluebird Realty Trust	Consent Judgment	Norfolk
General Investment & Development Co., d/b/a Windsor Meadows	Assurance of Discontinuance	Suffolk
Henry M. Barry, Individually and as he is Trustee of Main Realty Trust, Exchange Realty Trust, Mane Realty Trust, and Prospect Realty Trust	Assurance of Discontinuance	Suffolk

XII. *MOBILE HOMES*

Bluebird Acres Mobile Home Park, Inc. and Liberty Park Equipment and Sales Co., Inc.	Consent Judgment	Hampden
Anthony Graffeo, et al, d/b/a Starlite Trailer Park	Dismissed	Middlesex

XIII. *REAL ESTATE*

Skyline Manors	In Litigation	Hampden
Louraine E. Souther and Furmer H. Souther, d/b/a Brookside Acres Development Co. and Crest Realty Co.	In Litigation	Essex
Business Achievement Corporation	In Litigation	Middlesex
William Hartwick, Indiv. and as he is a partner in HOMES BY DESIGN	In Litigation	Suffolk
William Walo and Richard Levine, d/b/a HOMES BY DESIGN	In Litigation	Middlesex
Alan Zucker, d/b/a Alan Realty	In Litigation	Norfolk
Northeast Land Limited Partnership	In Litigation	Hampshire
Alfred Gladstone, Indiv. and as Trustee of Ridgewood Realty Trust and Michael F. Iodice, Sr.	In Litigation	Middlesex
Natale J. Sergi, Nancy J. Sergi, Nat Sergi Enterprises, Inc., and Liberty Hill Management		

Corporation	Consent Judgment	Essex
Goldstein and Gurwitz	Consent Judgment	Suffolk
Bird, Inc.	In Litigation	Middlesex

XIV. *GENERAL SALES PRACTICES*

Isaac Cohen, d/b/a C & C Oil Company	Consent Judgment	Suffolk
Diversified Products	In Litigation	Middlesex
Kaufman Carpet Co., Inc.	In Litigation	Suffolk
Apartment Showcase, Inc.	In Litigation	Middlesex
King's Row Fireplace Shop	Assurance of Discontinuance	Suffolk
Paul Sheridan, d/b/a Sherry Decorators	In Litigation	Suffolk
Paul Clare	Consent Judgment	Plymouth
Roche Insurance	In Litigation	Suffolk

XV. *TRAVEL*

Associated Travel Services of Newton, Inc.	Assurance of Discontinuance	Suffolk
Quality Travel Corp. of America	In Litigation	Norfolk
International Leisure Service, Irwin Berman	In Litigation	Suffolk
Sea and Sky Tours, Inc.	In Litigation	Norfolk

XVI. *UTILITY CASES*

Company	D.P.U. #	Date Filed	Amount Requested	Date Decided	Amount Granted	% of Amount Requested
Boston Edison Co.	18515	11/17/75	$54,000,000	8/12/76	$10,900,000	20.2%
Commonwealth Gas Co.	18545	11/14/75	11,342,000	9/28/76	7,637,000	67.3
Cape Cod Gas Co.	18571	12/17/75	2,631,000	10/29/76	0	
Lowell Gas Co.	18572	12/17/75	4,157,000	10/29/76	0	
Mass. Electric Co.	18599	1/16/76	21,090,000	11/30/76	15,372,000	72.9
Boston Gas Co.	18631	2/13/76	15,000,000	3/18/76	0	
Western Mass. Electric Co.	18731	5/18/76	20,310,000	4/8/77	16,757,000	82.5
New England Power Co.	(F.P.C.) ER-76-304 ER-76-317 ER-76-498	11/ 76	40,000,000	6/30/77	22,000,000	55.0
N. Attleboro Gas Co.	18928	12/1/76	92,000	4/11/77	59,000	64.0
New England Power Co.	(F.P.C.) ER-77-97 ER-77-75	12/6/76			Pending	
Granby Telephone Co.	19055	1/2/77	48,000	8/5/77	48,000	100.0
Cape Cod Gas Co.	19036	1/11/77	4,007,000	8/1/77	1,332,000	33.2
	19036A		2,900,000		0	
Lowell Gas Co.	19037	1/11/77	6,417,000	8/1/77	2,684,000	41.8
	19037A		5,446,000		0	
Fitchburg Gas & Electric Co.	19084	2/14/77	3,633,000	8/31/77	1,614,000	44.4
Montaup Electric	(F.P.C.)	5/1/77	1,600,000		Discovery Stage	
Nantucket Electric Co.	19192	5/17/77	463,000		Briefing Stage	
Fall River Gas Co.	19237	6/16/77	1,201,000		Briefing Stage	

XVII *INSURANCE CASES*

Fair Plan — Homeowner's Insurance

Attorney General Bellotti intervened and tried case in February of 1977. Brief filed February 18, 1977. Commissioner rejected Fair Plan's reported rate increase in its entirety in March, 1977.

Health Insurance — Blue Cross & Blue Shield Rate Cases

(a) Attorney General Bellotti intervened and tried a Blue Cross/Blue Shield non-group quarterly rate case in February, 1977. Brief filed February 25, 1977. Commissioner rejected Blue Cross/Blue Shield's requested rate increases in their entirety in March, 1977.

(b) Attorney General Bellotti intervened and tried a Blue Cross/Shield Medex I, II and III rate case in February, 1977. Brief filed March 1, 1977. Commissioner rejected rate increase in its entirety in March, 1977.

Automobile Insurance

(a) Attorney General Bellotti intervened in eight (8) of the twenty-two (22) individual companies' rate filings 11/15/76 for 1977 rates. All eight (8) filed downward revisions without a hearing.

(b) Attorney General Bellotti intervened in the "small companies" filing on 11/15/76 which covered ninety-five (95) insurers. All ninety-five (95) filed downward revisions during the hearings in December, 1976.

(c) Attorney General Bellotti intervened and tried and briefed the so-called "adequacy of competition" case in May, 1977 under G.L. c. 175E, §5. As a result of winning this case, auto insurance will be fixed and established in 1978.

(d) Attorney General Bellotti intervened in the rule making proceeding in May and June, 1977 concerning the operation of the Massachusetts Motor Vehicle Reinsurance Facility. Attorney General Bellotti filed two (2) briefs. The facility's operations were amended as a result of this case.

ENVIRONMENTAL PROTECTION DIVISION

I. *INTRODUCTION*

Responsibilities

The Environmental Protection Division of the Department of the Attorney General was established by statute, M.G.L. c. 12, §11D. This same statute also authorizes the Attorney General to take affirmative action to prevent or remedy damage to the environment.

The Secretary of the Executive Office of Environmental Affairs and two of the Departments under her jurisdiction, the Department of Environmental Quality Engineering and the Department of Environmental Management, generate the majority of the enforcement cases and defenses handled by this Division. We also represent the Department of Fisheries, Wildlife and Recreational Vehicles. Pursuant to M.G.L. c. 12, §11D, the Division is authorized to initiate cases on behalf of the Attorney General in many areas of environmental concern.

Massachusetts has a long-standing and well-established structure of environmental legislation covering, *inter alia,* air and water pollution, coastal and inland wetlands protection, solid waste disposal regulation and outdoor advertising control. In addition to enforcing these laws, the Division is also the legal representative of the Energy Facilities Siting Council, which regulates the siting and construction of electrical generation facilities, oil pipelines, and facilities associated with oil refining and production.

The Commonwealth's commitment to the protection of the environment is reinforced by the Massachusetts Environmental Policy Act (MEPA) and by Article 97 of the Amendments to the Massachusetts Constitution, the "Environmental Bill of Rights."

In a normal enforcement action on behalf of a client agency the Division seeks injunctive relief for compliance with a particular environmental

statute or regulation, and the award of a civil penalty for any past violation. Certain environmental statutes provide for criminal sanctions. In addition to the conventional legal responsibilities handled by the Division, EPD attorneys act as hearing officers, presiding over adjudicatory hearings held pursuant to the procedures of the Department of Evironmental Quality Engineering with regard to wetlands matters.

Special Funding

The Division is also the recipient of and responsible for funds received under two separate federal grants. In recognition of the role performed in Massachusetts by the Attorney General in the enforcement of federal and state air and water pollution standards, the U.S. Environmental Protection Agency approved grants to the Division of eighty thousand dollars ($80,000) in FY76 and one hundred twenty-eight thousand dollars ($128,000) in FY77. These monies have been used primarily for legal and support personnel.

Staff

At the close of the fiscal year the Division was staffed by a Chief, seven Assistant Attorneys General, an Administrative Assistant, a Natural Resource Economist, a Wetlands Specialist, and five legal secretaries.

II. *DESCRIPTION OF CATEGORIES OF CASES HANDLED BY THE ENVIRONMENTAL PROTECTION DIVISION*

A. AIR

Air pollution cases are referred from the Department of Environmental Quality Engineering, for violations of the State Air Pollution Control Regulations. The statutory authority is M.G.L. c. 111, §§142 A-E.

B. WATER

Water pollution cases are referred from the Division of Water Pollution Control, a semi-autonomous division of the Department of Environmental Quality Engineering. These cases generally involve violations of water discharge permits, which are issued jointly by the Division and the United States Environmental Protection Agency. Other water pollution cases involve those seeking to recover costs expended during oil-spill cleanup operations. The statutory authority is M.G.L. c. 21, §§26-53.

C. WETLANDS

Wetland cases are generally referred from the Department of Environmental Management, Restriction Division; the Department of Environmental Quality Engineering, Wetlands Division; and by citizen complaints. In addition, some cases are generated by investigations conducted by the Division itself. These cases fall into two categories:

(1) cases involving the permit program for altering of wetlands under M.G.L. c. 131, §40, (wetland enforcement cases) and

(2) cases challenging the development restrictions which the state is authorized to impose on inland and coastal wetlands pursuant to M.G.L. c. 130, §105 and c. 131,, §40A. (wetland defense cases).

D. SOLID WASTE

Solid Waste cases are referred from the Department of Environmental Quality Engineering. These cases involve the manner in which refuse is disposed of and the enforcement of the State's sanitary landfill regulations. The statutory authority is M.G.L. c. 111, §150A.

E. BILLBOARD

Billboard cases are referred from the Outdoor Advertising Board: These cases are governed by M.G.L. c. 93, §§29-33 and M.G.L. c. 93D, §§1-7 which regulate and restrict outdoor advertising and authorize a permit program. A majority of these cases are defenses of Petitions for Judicial Review which seek to have decisions of the Outdoor Advertising Board reversed.

F. NON-CATEGORICAL

A number of matters are handled by this Division each year which do not fall into the categories listed above. They include legal advice, unusual cases for the agencies as plaintiffs, cases in which the division represents an agency as defendant (ex. judicial review, declaratory judgment, *mandamus)* and those initiated or pursued by the Attorney General in areas of broad environmental policy, including such areas as nuclear power plant siting and construction *amicus curiae* briefs to the Supreme Court, NEPA (National Environmental Policy Act) and MEPA (Massachusetts Environmental Policy Act) cases, administrative interventions, and energy policy.

III. *DISPOSITION OF CASES AT THE END OF FY77*

A. During the fiscal year 1977 the Environmental Protection Division *opened* the following number of cases in each of the listed categories:

CATEGORY OF CASE	NUMBER OF CASES OPENED IN EACH CATEGORY
AIR	26
WATER	40
WETLAND	
Enforcement	8
Defense	17
Adj. Hearings	8
SOLID WASTE	27
BILLBOARD	49
NON-CATEGORICAL	41
TOTAL NUMBER OF CASES OPENED DURING FY77	216

B. During the fiscal year 1977 the Environmental Protection Division *closed* the following number of cases in each of the listed categories.

CATEGORY OF CASE	TOTAL NUMBER OF CASES CLOSED IN EACH CATEGORY
AIR	23
WATER	22
WETLANDS	
Enforcement	4
Defense	2
Adj. Hearings	2
SOLID WASTE	14
BILLBOARDS	7
NON-CATEGORICAL	4
TOTAL NUMBER OF CASES CLOSED DURING FY77	78

C. At the close of the fiscal year 1977 the Environmental Protection Division had the following number of cases remaining active in each of the listed categories:

CATEGORY OF CASE	TOTAL NUMBER OF CASES PENDING IN EACH CATEGORY
AIR	29
WATER	68
WETLANDS	
Enforcement	31
Defense	88
Adj. Hearings	12
SOLID WASTE	44
BILLBOARDS	91
NON-CATEGORICAL	35
TOTAL NUMBER OF CASES REMAINING ACTIVE AT THE CLOSE OF FY77	398

IV. *IMPORTANT CASES HANDLED DURING FY77*

A. AIR CASES

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING vs. UNION PETROLEUM CORPORATION

The defendant was in violation of M.G.L. c. 111, §142 (Massachusetts Clean Air Act), the Regulations for the Control of Air Pollution in the Metropolitan Boston Air Pollution Control District and

a Department of Public Health Order for their illegal operation of an industrial oil terminal facility in Revere, Massachusetts. Following the filing of a complaint, the parties executed an Agreement for Judgment which provided in part that the defendant would comply with the Massachusetts Clean Air Act, would pay civil penalty in the amount of twelve thousand dollars ($12,000) for past violations, and would submit to a liquidated damages clause that calls for a fine of one thousand dollars ($1,000) for each day of noncompliance with the terms of the judgment. This was the first penalty collected for air pollution.

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING vs. HOLLISTON SAND AND GRAVEL
(Suffolk Superior No. 18638)

This case was brought by the Department to seek enforcement of the Massachusetts Clean Air Act, G.L. c. 111, §142A *et seq.*, and the attendant regulations. The defendant owned a rock crushing and sand manufacturing operation and did not properly control the fugitive dust emissions. On the eve of the hearing on the Department's motion for a preliminary injunction seeking to shut down the company's operation, the company agreed to install the necessary air pollution control equipment and to pay $15,000 for creating a public nuisance.

B. WATER

DIVISION OF WATER POLLUTION CONTROL vs. REVERE, CITY OF

The defendant was in violation of M.G.L. c. 21, §§26-53 (Massachusetts Clean Water Act) and of a water-discharge permit which was jointly issued by the Environmental Protection Agency and the Division of Water Pollution Control. The suit sought to enforce the permit and to prevent sewage from being introduced into the storm drainage system. An agreement was reached and a Consent Judgment was filed. The Consent Judgment provides for the completion of the necessary engineering work, an escrow account of $50,000, which will be administered by this Division, and a liquidated damages clause of $1,000 for each day of violation of any term in the Judgment.

DIVISION OF WATER POLLUTION CONTROL vs. WORCESTER SPINNING AND FINISHING COMPANY

The defendant was in violation of M.G.L. c. 21, §§26-53 (Massachusetts Clean Water Act) for discharging processing wastes into the Kettle Brook in Worcester. An adjudicatory hearing was held on this matter and a final decision was rendered. The defendant failed to comply with the terms of this decision. The Division then filed a suit seeking to have a preliminary injunction issued against the defendant, and asking for a civil penalty. An agreement was

worked out with the company and a Consent Judgment entered into. The Consent Judgment provided for the construction of an approved water pollution control facility, a civil penalty in the amount of $8,000 and a liquidated damages clause for violation of the judgment. This was the first civil penalty recovered against a violator of the Massachusetts Clean Waters Act.

DIVISION OF WATER POLLUTION CONTROL v. TOWN OF DIGHTON

This action was brought because of the town's failure to comply with the Massachusetts Clean Waters Act, G.L. c. 21, §§26 *et seq.*, and a water discharge permit that was issued jointly by the Massachusetts Division of Water Pollution Control and the United States Environmental Protection Agency to the town. The Massachusetts Superior Court granted the Commonwealth's motion for a summary judgment, ordering the town to comply with the statute and to pay a civil penalty of $35,000.00 for violating the permit. This is the first case in which a civil penalty was awarded against a municipality under the Massachusetts Clean Waters Act.

DIVISION OF WATER POLLUTION CONTROL v. C. RAY RANDALL MANUFACTURING, INC.

This action was brought against a metal plating company for its failure to comply with the Massachusetts Clean Waters Act and the pollution abatement schedule set forth in its jointly-issued water discharge permit. The Division moved for and was granted a preliminary injunction ordering compliance by July 1, 1977. This is the first such injunction under the Massachusetts Clean Waters Act. Since that time the company has agreed to pay a $25,000 civil penalty.

UNITED STATES OF AMERICA v. CITY OF LYNN AND COMMONWEALTH OF MASSACHUSETTS

On June 16, 1977, the Environmental Protection Agency brought an action against the City of Lynn for failure to comply with the Federal Water Pollution Control Act 42 U.S.C. §§1251 *et seq.* The Commonwealth of Massachusetts was joined as a party. Rather than defend the city, which had violated this jointly issued water discharge permit, the Commonwealth brought a cross claim against the City of Lynn under the Massachusetts Clean Waters Act. After discovery, the Commonwealth prevailed on its motion for summary judgment and the City of Lynn agreed to a judgment which provided a schedule for the completion of construction of its wastewater treatment facility and payment of a $10,000 civil penalty for its past violations of the Massachusetts Clean Waters Act and its discharge permit. The federal government's claim is still pending.

DIVISION OF WATER POLLUTION CONTROL, et al v. ADVANCED COATINGS COMPANY

This action was commenced as the result of complaints from the residents of Lawrence and Lowell that the public water supply reeked of an obnoxious odor. Investigation by personnel from the Department of Environmental Quality Engineering revealed that the source of the odors was the Advance Coatings Company of Westminster, Massachusetts. Apparently a number of barrels in which the company stored wastes from its manufacturing process had burst. The wastes, consisting of a varied mixture of largely unknown chemical components, discharged into drains at the perimeter of the company's property, and into a nearby pond. The wastes then flowed into the Nashua River and thence to the Merrimack River. The Merrimack River is the source of the public water supply for the cities of Lawrence, Lowell and Methuen.

The Superior Court granted a temporary restraining order enjoining the company from producing additional wastes until the chemical make-up of the wastes had been determined. A consent judgment was later entered requiring the company to store all of the barrels containing waste in an enclosed room. The consent judgment also required the company to hire an engineer in order to determine whether the soils surrounding the plant were contaminated with wastes, and to undertake any remedial actions necessary to eliminate the further discharge of those wastes.

C. WETLAND CASES

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING v. FARRAR & CARTY, INC.

The defendant was in violation of M.G.L. c. 131 §40 (Wetlands Protection Act), M.G.L. c. 111, §150A (Solid Waste Disposal Act) and M.G.L. c. 21, §§26-53 (Massachusetts Clean Water Act). The defendant was operating a landfill site which resulted in the filling in of a wetland in the flood plain of the Charles River. Because of its close proximity to the Charles River, it posed a serious threat to the river's water quality. A settlement was reached with the defendant which provided for the removal of the materials dumped on certain portions of the landfill site and for a civil penalty in the amount of $1,000. This was the first such civil penalty recovered.

DEPARTMENT OF ENVIRONMENTAL QUALITY ENGINEERING v. GAGNE

In this case the Commonwealth had obtained an agreement for a preliminary injunction pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, §40 which enjoined the defendant

from the further dumping of gravel on the site. The defendant argued that he was merely improving an existing dike. Although the plaintiff's petition was only for civil contempt, the Court found the defendant guilty of criminal contempt and fined him $10,000.00. The Court also awarded the Commonwealth a civil contempt penalty of $3,138.00, which included attorney fees for the contempt hearing. The defendant has appealed.

D. BILLBOARDS

JOHN DONNELLY v. OUTDOOR ADVERTISING BOARD AND TOWN OF BURLINGTON

In the first of the post "Brookline" decisions, the Massachusetts Appeals Court held in November of 1976 that recent free-speech cases out of the U.S. Supreme Court do not change the SJC's result in Brookline; balancing the right to communicate against the interest in regulating billboards, a community can prohibit off-premise outdoor advertising.

TOWN OF MILLBURY v. OUTDOOR ADVERTISING BOARD

In this case, we persuaded the Outdoor Advertising Board to reverse its position while the case was on appeal, and it worked out well. The SJC ruled in January of 1977 that a "non-conforming use" provision in local zoning by-laws which did not unambiguously include billboards would be read to exclude them. The decision rested on the interpretation of G.L. c. 40A, §5 and judicial glosses on the word "structure".

E. CIVIL PENALTIES

Civil penalties were awarded or agreed to in the following cases:

Case	Type	Penalty	Date Entered
DWPC v. Dante	Water	$25,000	3/1/77
DWPC v. Hilsinger	Water	$10,000	5/2/77
DWPC v. Microfab	Water	$ 6,000	8/22/77
DEQE v. Gagne	Wetlands	$13,138	6/3/77
DWPC v. Dighton	Water	$35,000	6/27/77
DWPC v. Garelich	Water	$ 3,000	1/19/77
DEQE v. Rapid Processing	Air	$ 5,100	4/27/77
DWPC v. Simonds Cutting Tools	Water	$15,000	7/20/77

Case	Type	Penalty	Date Entered
DEQE v. Union Petroleum	Air	$12,000	11/19/76
Brown v. Farrar and Carty	Wetlands. Water. Solid Waste	$ 1,000	4/30/76
DEQE v. Ferrous Technology, Inc.	Air	$ 5,000	7/1/77
McMahon v. Stevens Paper, Inc.	Water	$ 1,000	1/25/77
DEQE v. Gassett	Air	$ 750	6/30/77
McMahon v. Foster Metal Products	Water	$ 250	3/20/77
DWPC v. F. B. Silver Company	Water	$ 5,000	4/11/77
DWPC v. Leach Garner Company	Water	$ 500	2/23/77
DEQE v. Holliston Sand Company	Air	$15,000	7/1/77

F. NON-CATEGORICAL CASES

FEDERAL AVIATION ADMINISTRATION SUIT

The Attorney General has joined in an action along with Illinois and New York seeking to have the Federal Aviation Administration impose limits on jet noise at airports.

The suit attempts to compel the Federal Aviation Administration to promulgate regulations that would:

(1) curtail noise from older model airplanes;

(2) control aircraft in the vicinity of the airports to maintain minimum flight altitudes;

(3) establish operating procedures for aircraft on arrivals and departures at airports.

The promulgation of these new regulations would serve to protect the public health.

FLUOROCARBON PETITIONS

The Attorney General has joined in three petitions seeking to have aerosol sprays containing ozone-destroying fluorocarbon compounds banned as hazardous products. The first petition was filed in July of 1976 with the Consumer Product Safety Commission; the second and third petitions in October 1976 with the Food and Drug Administration and the Environmental Protection Agency.

Scientific evidence has indicated that the continued use of pressurized products containing fluorocarbon compounds as propellants will cause a substantially greater incident of skin cancer. The fluorocarbon propellants that are released into the atmosphere deplete the earth's protective ozone layer and allow cancer-producing ultraviolet rays to reach the earth's surface. These ozone-depleting propellants can be found in a very wide variety of aerosol products, including hair sprays, deodorants, air fresheners, pesticides, oven cleaners and furniture polish.

The National Academy of Science originally estimated that there would be approximately a 7% decrease in the ozone layer. However, recent evidence now indicates that the harm to the ozone layer will be twice as great as previously estimated, at least 13% to 16% decreases. This doubling of the predicted ozone loss in turn doubles the estimated increase in skin cancer due to ultra-violet radiation which will no longer be blocked by the earth's protective ozone shield. It is estimated that a 15% loss of ozone would cause between 90,000 and 300,000 additional cases of skin cancer per year in the United States alone.

LIQUEFIED NATURAL GAS STATEMENT

The Attorney General submitted a written statement to the Federal Energy Administration in October of 1976 regarding federal policy on Liquefied Natural Gas. The statement pointed out the safety problems associated with the importation, storage and transfer of Liquefied Natural Gas.

The statement recommended that a detailed analysis be conducted of the safety questions associated with Liquefied Natural Gas facilities and their operating procedures.

The most important recommendation in the statement concerns the need for uniform standards. We have urged the FEA to set up uniform siting criteria for LNG facilities, with such criteria focusing on public safety.

The statement does not question the importance of LNG facilities, merely the propriety of their location.

PETITION FOR RULE-MAKING FOR THE OUTER CONTINENTAL SHELF

The Division prepared a petition to the Department of Interior requesting that it promulgate the necessary rules and regulations in order to safeguard the environment during offshore drilling operations on the outer continental shelf. We are urging the adoption of rules which will ensure that the development of the oil resources of Georges Banks is carried out in a manner consistent with the economic and social interests of the Commonwealth and its citizens.

The petition seeks to ensure the well-being of the environment and of our industries which are dependent upon the existence of an ecologically sound and aesthetically appealing shoreline without interfering substantially with exploration and drilling operations.

SEABROOK NUCLEAR POWER PLANT PROCEEDINGS

In the past year, the "Seabrook Case" has been before five administrative tribunals and the U.S. Court of Appeals for the First Circuit. It can fairly be described as the most controversial — and procedurally confusing — nuclear power case in the country.

In July 1976, the Atomic Safety & Licensing Board of the NRC granted construction permits after almost two years of evidentiary hearings, in which the A.G. represented the Commonwealth as an "interested state." *Inter alia*, the Licensing Board ruled that the project was acceptable if it employed once-through cooling (*i.e.*, if it received an exemption from EPA regulations) but that, if cooling towers were required, the costs would outweigh the benefits and the permits would not issue. Along with four other intervenors, we appealed to the Atomic Licensing Appeals Board and, at about the same time, moved for a stay of the permits pending appeal. The stay was denied and the denial appealed to the Court of Appeals for the First Circuit.

While these matters were pending, the Regional Administrator of the U.S. Environmental Protection Agency, exercising his authority under the federal Water Pollution Control Act, rejected the company's application for an exemption from the closed-cycle cooling regulations. In our opinion this triggered the "condition" in the NRC license and the permits should have been automatically revoked, or, in the alternative, suspended to prevent meeting the issues by presenting the regulators with a *fait accompli*. The NRC staff, predictably enough, didn't see it that way. We argued the point in the First Circuit, which wrote a memorandum accepting our formulation of the issues and directing the NRC to rule on the matter finally by February 18, 1977 or have the Court rule on it.

On January 21, 1977, the Appeals Board issued a 113-page opinion *suspending* the Seabrook permits on the grounds of identified obvious deficiencies in the Licensing Board record and decision, combined with the uncertainty occasioned by the EPA decision. The full commission exercised its discretionary (and rarely used) authority to review that decision. Oral argument will take place in Washington, D.C. on February 7.

GENERIC RULE-MAKING PROCEEDING PENDING BEFORE NUCLEAR REGULATION COMMISSION

The Commonwealth is a full participant in the ongoing rule-making proceedings on the wide-scale use of mixed-oxide (uranium *plus* plutonium) fuel in power reactors. The A.G., working with the New York A.G., through the Environmental Committee of NAAG, helped to educate a number of states to the importance of this proceeding. As a result, Minnesota, Kentucky, Wisconsin and other states, have joined the proceedings. We are working very closely with New York, Wisconsin and several national environmental groups in analyzing the massive record and preparing expert testimony.

Plutonium is the raw material of nuclear weapons. The wide-scale use of plutonium in fuel would take us into a new generation of nuclear technology involving economic and social costs which are hotly debated.

CONNECTICUT RIVER FISHWAYS CASE

This Division represented the fishery agencies of all the states in the Connecticut River Basin (Massachusetts, Connecticut, New Hampshire and Vermont) in hearings before the Federal Power Commission to require the Western Massachusetts Electric Company to install fish passage facilities at its dam at Turners Falls, Massachusetts. After evidence was presented, an agreement was reached which will require the company to complete two sets of facilities by 1981 and 1983. An additional agreement has been reached with regard to the Vernon Dam, which is further up-river. This is a major milestone in the states' program to restore salmon, shad and other anadromous species to the Connecticut River.

BOSTON EDISON/PILGRIM GENERATING STATION UNIT #2

In 1976, the evidentiary hearings before the Atomic Safety and Licensing Board of the U.S. Nuclear Regulatory Commission continued. The Commonwealth, as an intervenor in the licensing case, offered 10 expert witnesses on a variety of topics, including *inter alia*, the risk of theft and sabotage at nuclear facilities, the need for power, and the economics of nuclear power as contrasted with several alternatives. Other issues we have raised include the adequacy of Edison's quality assurance program to protect against mishaps. At present, the Pilgrim proceedings are *de facto* suspended because the company is disputing the NRC staff's evaluation of the earthquake potential of the Pilgrim site.

The Following Pages
Contain Opinions Rendered
by the Attorney General
during the Year.

Number 1. July 8, 1976

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested my opinion on a series of questions dealing with what you describe as "the long-standing practice of requiring candidates for nomination at a state primary to enroll in the party whose nomination is sought at least twenty-eight days before the deadline for filing nomination papers." Specifically, you have asked me:

> "1. If a candidate requests a certificate of enrollment in a political party in the manner prescribed by Chapter 53 of the General Laws, Section 48, on or before the last day prescribed by that section for filing nomination papers, are the registrars required to issue a certificate of enrollment from one party to another less than one year prior thereto and if the candidate:
>
> (a) if not registered, has filed an affidavit of registration indicating his wish to enroll in that political party?
>
> (b) if registered, but unenrolled, has filed a certificate or written request seeking to establish his enrollment in that political party?
>
> (c) has voted in a primary of that political party?
>
> (d) if enrolled in another political party has filed a certificate or written request to change his enrollment to that political party?
>
> 2. Does enrollment in a political party or any change or cancellation of enrollment take effect immediately upon the filing of an affidavit of registration or written request for a change or cancellation of enrollment or on voting in a primary election except during a period beginning at ten o'clock in the evening of the twenty-eighth day prior to a state or presidential primary or the twentieth day prior to a special state primary or city or town primary and ending with the day of such primary?"

In the material accompanying your request you informed me that "in the past the position of the Elections Division (of the Department of the State Secretary) has been that candidates for nomination in a state primary must be enrolled members of the party whose nomination they seek, and must be enrolled at least 28 days before the deadline date for filing nomination papers." Essentially, you ask me whether or not this position should be reversed. I conclude that it should not be. The apparent statutory bases for this practice are the provisions of General Laws, Chapter 53, Sections

38[1] and 48[2]. I find these statutes ambiguous but believe that the long-standing and consistent administrative interpretation of these laws by your office and by municipal registrars and clerks is entitled to great weight. *Rockland Mutual Insurance Co.* v. *Commissioner of Insurance,* 360 Mass. 667 (1971); *Collector of Taxes of Boston* v. *Cigarette Service Co.,* 325 Mass. 162 (1950). Both of the statutes under consideration have been extensively amended during the existence of this administrative practice. *See, e.g.,* St. 1974, c. 79: St. 1971, c. 920. but none of these amendments has effectively altered the provision of law governing the practice. Under these circumstances, it may be said that the General Court has acquiesced in the long-standing interpretation of the laws. *Saxbe* v. *Bustos,* 419 U.S. 65 (1974). While it has been stated that "legislative silence is a poor beacon to follow in discerning statutory meaning . . . because it often betokens unawareness," *Zuber* v. *Allan* 396 U.S. 168 (1969), every legislator was at one time a candidate who by necessity complied with General Laws, Chapter 53, Section 48. Thus, it would fly in the face of reason to attribute legislative silence in this case to unawareness. It is, therefore, my opinion that the twenty-eight day requirement has become firmly engrafted upon existing law and that it should be reversed only by the General Court itself.

Based on the foregoing analysis and assuming that your question relates to the specifically enumerated officers in Section 48 I answer your questions as follows:[3]

1. (a) Yes, if the affidavit is filed at least twenty-eight days prior to the last day for filing nomination papers.

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[1]Chapter 53, Section 38 of the General Laws provides in part:
No voter enrolled under this section or section thirty-seven shall be allowed to receive the ballot of any political party except that with which he is so enrolled; but, except as otherwise provided by said section thirty-seven, a voter may, except within a period beginning at ten o'clock in the evening of the twenty-eighth day prior to a state or presidential primary or the twentieth day prior to a special state primary or city or town primary and ending with the day of such primary, establish, change or cancel his enrolment by forwarding to the board of registrars of voters a certificate signed by such voter under the pains and penalties of perjury, requesting to have his enrolment established with a party, changed to another party, or cancelled, or by appearing in person before a member of said board and requesting in writing that his enrolment be so established, changed or cancelled. The processing of an absentee ballot to be used at a primary shall also be deemed to establish the enrolment of a voter in a political party, effective as of the date of said processing. Except as otherwise provided in section twelve of chapter four, such enrolment, change or cancellation shall take effect at the expiration of twenty-eight days for a state and presidential primary or twenty days for a special state primary or city or town primary following the receipt by said board of such certificate, or such appearance, as the case may be. No voter enrolled as a member of one political party shall be allowed to receive the ballot of any other political party, upon a claim by him of erroneous enrolment, except upon a certificate of such error from the registrars, which shall be presented to the presiding officer of the primary and shall be attached to, and considered a part of the voting list and returned and preserved therewith; but the political party enrolment of a voter shall not preclude him from receiving at a city or town primary the ballot of any municipal party, though in no one primary shall he receive more than one party ballot.

[2]Chapter 53, Section 48, of the General Laws, provides in part:
There shall not be printed on the ballot at the state primary the name of any person as a candidate for nomination for any office to be filled by all the voters of the commonwealth, or for councillor, senator, representative to the general court, representative in congress, district attorney, clerk of court, register of probate and insolvency, register of deeds, county commissioner, sheriff, or county treasurer, unless a certificate from the registrars of voters of the city or town wherein such person is a registered voter that he is enrolled as a member of the political party whose nomination he seeks is filed with the state secretary on or before the last day herein provided for filing nomination papers. Said registrars shall issue such a certificate, signed by a majority thereof, forthwith upon request of any such candidate so enrolled or of his authorized representative. No such certificate shall be issued to any person who is a candidate for nomination for any such office, if such person has changed his party enrolment less than one year prior to the last day for filing nomination papers with the state secretary as provided by this section.

[3]I have further assumed that your questions concern regular, as opposed to special, state primaries. As to special primaries, a twenty day waiting period would apply. M.G.L., c. 53, §38.

(b) Yes, if the certificate or written request is filed at least twenty-eight days prior to the last day for filing nomination papers.

(c) Yes, in accordance with the provisions of General Laws, Chapter 53, Sections 37 and 37A.

(d) Yes, if the certificate or written request is filed at least one year and twenty-eight days prior to the last day for filing nomination papers.

Your second request poses the already answered questions in general terms. I answer it merely by reiterating my opinion that the pre-existing administrative practice is controlling. Finally, I note that although your letter concerned itself with the party enrollment of candidates, similar problems arise as to individual voters. I mean to express no view as to the effective date of a voter's party enrollment and have before me no indication of prior administrative practice.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 2. July 21, 1976

Vahan Vartanian
Major General, Mass ARND
The Adjutant General
905 Commonwealth Avenue
Boston, Massachusetts 02215

Dear Major General Vartanian:

You have requested my opinion on several questions concerning the protection against liability of military medical personnel in the Massachusetts National Guard when they provide medical services or treatment while serving on either mandatory annual field service training duty (G.L. c. 33, §60), or the required shorter training drills held throughout the year (G.L. c. 33, §61). Specifically you ask:

> 1. In the case of Massachusetts National Guard medical personnel treating other military members of the Massachusetts National Guard, does there exist any right by the treated military person to maintain an action for alleged medical malpractice against the Massachusetts military medical personnel.
>
> 2. In the event that your answer is in the affirmative, does the Massachusetts military medical personnel have any protection under Massachusetts laws and the right to a defense by the Office of the Attorney General.
>
> 3. In the case of Massachusetts National Guard medical personnel treating military members of the National Guard who are not members of the Massachusetts National Guard (i.e., 43rd Brigade, Connecticut National Guard and 1-26 Cavalry, Rhode

Island National Guard) and members of active U.S. Forces, does that non-Massachusetts military member of the National Guard or member of active U.S. Forces have the right to maintain an action for alleged medical malpractice against the Massachusetts military medical personnel.

4. In the event that your answer is in the affirmative, does the Massachusetts National Guard medical personnel have any legal defense under Massachusetts laws and the right to a defense by the Office of the Attorney General.

5. In the case of Massachusetts National Guard military medical personnel providing medical service or treatment to civilians, either Massachusetts residents or non-Massachusetts residents on either emergency or routine basis, does the civilian in any case have a right to maintain an alleged malpractice action against the Massachusetts military medical personnel and does the Massachusetts military medical personnel have any defense under Massachusetts laws and the right to a defense by the Office of the Attorney General.

I will respond to your questions first by considering the liability of the Guard's military medical personnel to each of the three classes of persons you mention in questions 1, 2 and 5. I will then discuss the issue of legal representation of the military medical personnel by the Attorney General.

1. It is my opinion that a military member of the Massachusetts National Guard does not have a right to maintain an action against a fellow member of the Guard for injuries resulting from medical treatment or services rendered by the latter during the Guard's mandatory training periods. A well-established principle of military law provides that a soldier in the armed forces is not liable to another soldier for acts of negligence performed in the line of duty. *E.g. Feres v. United States,* 340 U.S. 135, 141-42 (1950); *Hass for the use of United States v. United States,* 518 F. 2d 1138, 1143 (4th Cir. 1975); *Mattos v. United States,* 412 F. 2d 793, 794 (9th Cir. 1969); *Roach v. Shields,* 371 F. Supp. 1392, 1393 (E. D. Pa. 1974); *contra, Mazurek v. Skaar,* 60 Wis. 2d 420, 210 N.W. 2d 691, 694 (1973).[1] This rule has been applied specifically to acts of alleged negligent medical malpractice. *See, e.g., Bailey v. Van Buskirk,* 345 F. 2d 298 (9th Cir. 1965), *cert. denied,* 383 U.S. 948 (1966); *Bailey v. DeQuevedo,* 375 F. 2d 72, 73-74 (3rd Cir.), *cert. denied,* 389 U.S. 923 (1967); *Roach v. Shields, supra.*

[1]The protection afforded by this rule appears to apply only to negligent acts performed in the line or course of duty. *See Roach v. Shields, supra.* Wilful, wanton or malicious acts of a military officer are not within the scope of the rule, and the officer could be sued by a fellow member of the force for injuries arising from such acts. *See, e.g., Crozman v. Callaghan,* 135 F. Supp. 466 (W. D. Okla. 1955); *Wilkes v. Dinsmore,* 7 How. 89, 130 (1849). *See also, Gildea v. Ellershaw,* 363 Mass. 800, 824 (1973) (immunity for non-judicial public officers' negligent actions within their discretionary powers, but not for acts of misfeasance or those made in bad faith); *but see Gamadge v. Peal,* 217 F. Supp. 384, 390 (N.D. Cal. 1962).

There are no Massachusetts decisions that have specifically considered or adopted this rule. However, in light of the rule's widespread acceptance, *Feres, supra* at 141; *Bailey v. Van Buskirk, supra* at 298,[2] I believe it likely that our courts would find it applicable to an action for alleged malpractice brought by one Massachusetts guardsman against another for acts performed in the course or line of duty. The Supreme Judicial Court's apparent approval of a related immunity rule for servicemen in *Neu v. McCarthy*, 309 Mass. 17, 22-23 (1941) (soldier's obedience to a military order may justify conduct otherwise giving rise to civil or criminal liability unless order is "palpably unlawful"), leads me to conclude that it would similarly adopt the principle under discussion here, for the rationale underlying both rules is similar: the necessity of an effective discipline system in the armed forces in order to maintain a strong military force. Just as discipline would be undermined if servicemen could question the propriety of their superiors' orders, so would it be if servicemen could litigate among themselves over performance of their military duties. *See Bailey v. Van Buskirk, supra* at 298; *Bailey v. DeQuevedo, supra* at 73-74.

The only remaining question is whether medical personnel of the National Guard are acting in the "line" or "course" of duty while providing medical treatment and services during their statutorily required training programs. I have concluded that they are so acting.

The military duties and responsibilities of the Massachusetts National Guard are set forth in Chapter 33 of the General Laws. *See* G.L. c. 33, §§38-47, 57-61. The regular annual service training program and the unit training drills required by §§60 and 61, respectively, are explicitly defined as part of these duties. *See, e.g.*, §§57, 59, 61 and 83. Furthermore, as you indicate in your letter, the conduct of the medical personnel in the National Guard during these periods is governed entirely by the provisions of military law set forth in Chapter 33, including those concerned with disciplinary measures and military courts. Under such a system, I believe it is clear that members of the National Guard's medical personnel are acting in the line or course of duty while performing authorized[3] medical services during their training service. Under the general rule discussed above, they are not liable to their fellow Guard members for negligent acts committed within the scope of their authority which might in other circumstances constitute actionable medical malpractice.

Independent of this common law rule,[4] Chapter 33 contains a specific

[2]While the Supreme Court of Wisconsin declined to follow the rule of "serviceman immunity" in a case between two national guardsmen, *Mazurek v. Skaar, supra*, it seems to be the only court to have done so.

[3]I use the word "authorized" to distinguish the situation in which a particular medical officer performs a medical service during his training duty that is outside the scope of any orders he received. In such a case, I do not believe that the officer could derive protection from liability under the general rule described above. *See Ela v. Smith*, 5 Gray 121, 141 (1855) (members of militia would be liable to civilian plaintiff for personal injuries he sustained if they acted outside of specific order of Mayor in acting to quell riot).

[4]A second common rule may also be applicable to National Guardsmen serving on their training duty: the doctrine under which public officers are granted immunity from liability for negligence resulting from decisions and actions made and taken within the scope of their duties, in good faith and without malice. *See, e.g., Somers v. Osterheld*, 335 Mass. 24, 27 (1956) (superintendent of state hospital as public official not liable for omission to perform his statutory duties in caring for a patient under his charge); *see also Gildea v. Ellershaw, supra*, 363 Mass. at 820-22. However, since this rule as applied to "public officers" does not appear to afford immunity from liability that is as broad as that provided the Guardsmen by G.L. c. 33, §53 (discussed immediately below in the text), I do not attempt to resolve the difficult threshold question of whether the rule does in fact apply to members of the National Guard.

immunity provision that is applicable to military medical personnel in the National Guard. Section 53 of that chapter provides:

> No officer or enlisted person shall be liable for any damage to property or injury to any person, including death resulting therefrom, caused by him or by his order, while performing any military duty lawfully ordered under any provision of this chapter, unless the act or order causing such damage or injury was manifestly beyond the scope of the authority of such officer or enlisted person.

Under this section, a member of the military medical personnel in the National Guard would be protected against a claim of damages for injuries resulting from his provision of medical services as long as two conditions are met: (1) the medical officer's performance of the services constitutes "military duty lawfully ordered;" and (2) the act or order resulting in injury was not "manifestly beyond the scope" of his authority. For the reasons I gave above in discussing the phrase "in the line or course of duty" in the context of Chapter 33, it is my opinion that the medical services and treatment performed by National Guard medical personnel during their mandatory training sessions qualify as "military duty" within the meaning of §53.[5] Whether or not the second condition is satisfied obviously depends on the particular facts and circumstances of each case. As a general matter, however, it seems clear that this statute would serve to protect the military medical personnel from liability for acts of alleged negligent malpractice they might commit while serving on their training duty under G.L. c. 33, §60 or §61. *Accord, Goldstein v. State*, 281 N.Y. 396, 24 N.E. 2d 97, 101 (1939). *Cf. Mazurek v. Skaar, supra* at 693-94 (1973).[6]

2. For essentially the same reasons discussed in my answer to your first question, I am of the opinion that neither military members of other states' National Guards nor active duty members of the United States armed forces may maintain actions against military personnel in the Massachusetts National Guard for allegedly negligent medical malpractice, again provided that the acts were within the scope of the medical officer's duties, and were performed in good faith and in the course of a required training session.

No cases between soldiers in different armed forces have been found in which a court considered or discussed the principle of "servicemen

[5]The legislative history of this section supports my conclusion. The original version of the predecessor to §53 was enacted in 1939. It provided members of the National Guard with immunity from civil or criminal liability solely for injury to persons or property arising out of acts they performed while serving under those sections of Chapter 33 concerned with protection against invasion or insurrection, riots, public catastrophe, etc. — the antecedents to the present §§40 through 42. St. 1939, c. 425, §1. In 1943, the Legislature broadened the scope of statutory immunity to protect members of the Commonwealth's armed forces from civil or criminal liability for injuries or damage caused while performing "any military duty lawfully ordered under any provision of [Chapter 33]." At the time the Legislature passed this amendment, the military training duties of the National Guard were already a part of Chapter 33. The present §53, enacted in 1954, does not differ in any material way from the 1943 version of the section. Similarly the present §60 and §61 follow closely the provisions of their predecessor sections.

[6]It should be noted that the Legislature has not left an injured member of the Massachusetts National Guard without a remedy. *See* G.L. c. 33, §§58 *et seq.* which establish a compensation system for officers and enlisted National Guardsmen and certain civilians who are injured in the line of duty. It seems clear that a member of the National Guard who has been injured as the result of medical treatment he received from a fellow member may seek relief under these sections.

mmunity" described above. In my judgment, however, the reasons for dopting such a rule are the same as in the cases previously cited, where soldier claims damages from a member of the same force, and it seems kely that a court would so rule. Moreover, regardless of this rule, the mmunity provisions of G.L. c. 33, §53 protect the Guardsmen against ability for injury to *any* person — including non-Massachusetts military ersonnel.

3. Similarly, with respect to the liability of National Guard military nedical personnel to civilians for injuries resulting from the former's provision of medical services, I conclude that G.L. c. 33, §53 affords the nedical personnel immunity from suit if the two conditions of the statute iscussed above (see pages 6-8) are met.

4. Finally, I turn to your questions regarding the right of National Guard military medical personnel to be represented by the Attorney General in the types of actions for alleged medical malpractice with which you re concerned. Each of these questions actually encompasses two subsidiary questions: (1) what is the extent of representation afforded officers nd employees of the Commonwealth by the Attorney General in actions or personal injuries (and specifically malpractice actions) arising out of erformance of their official duties; and (2) to what extent are members f the National Guard considered "officers" or "employees" of the Commonwealth for purposes of representation by the Attorney General. Resolution of the second question is only necessary if as a general rule state fficers and employees would be entitled to representation by this Department in the types of actions for alleged malpractice you have described. However, since I conclude that they are not so entitled, I do not reach his second issue.

Pursuant to G.L. c. 12, §3, the Attorney General represents state fficers in all actions and other civil proceedings in which their "official cts and doings" are called into question. Although the parameters of this road statutory language are not further delineated or explained in §3, he following sections in Chapter 12 provide more guidance in defining he scope of the Attorney General's duties with respect to defending state mployees in actions for personal injuries which are brought against them. Thus, c. 12, §3B provides that the Attorney General is to defend, upon equest, an officer or employee of the Commonwealth against any action or personal injuries (including death) or property damage arising from he employee's operation of a state-owned motor vehicle within the scope f his official duties; §3C authorizes the Attorney General, again upon he request of the state employee involved, to settle this type of motor ehicle tort action for $1000 or less; finally, §3D requires the Attorney General to defend any officer or employee of the Department of Mental Health, Public Health or Correction, or the Commonwealth's Soldiers' Homes in "an action for damages for bodily injuries or infections, physical r mental agony or pain, death of any person" or certain types of property amage arising out of the operation of these departments or homes.

General Laws, c. 12, §§3, 3B, 3C and 3D are the only statutes directly concerned with the scope of the Attorney General's responsibilities for representing state officers and employees. The specific nature of the mandate imposed on the Attorney General in §§3B, 3C and 3D indicates that the Legislature did not intend him to defend state employees in actions for personal injuries not expressly mentioned in these sections. *See*, on questions of statutory construction, *Wood v. Commissioner of Correction*, 363 Mass. 79, 82 (1973); *Iannelle v. Fire Commissioner of Boston*, 331 Mass. 250, 252-53 (1954). Accordingly, I am of the opinion that the Attorney General is obligated to represent a state officer or employee in a damage action for personal injuries only if he or she falls within the specific category of employee listed in G.L. c. 12, §3D, or the particular action is within the class of civil proceeding covered by G.L. c. 12, §3B or §3C.[7] In other words, returning to the issue of specific interest to you, it is my conclusion that if a state officer or employee outside the departments and agencies listed in §3D is named as a defendant in an action for damages for alleged malpractice performed in the course of his duties, the employee will not be entitled to representation by this Department.

Having reached this conclusion, it is not necessary to determine whether or for what purposes military members of the National Guard serving on training duty should be considered state officers or employees;[8] however, the Guardsmen are classified, they still would not be entitled to this Department's representation in the types of alleged malpractice actions you describe because they do not come under the explicit provisions of G.L. c. 12, §3D.[9]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 3. July 28, 1976

Commisioner John A. Calhoun
Department of Youth Services
73 Tremont Street
Boston, Massachusetts 02108

Dear Commissioner Calhoun:

You have requested my opinion concerning your authority, as Commissioner of the Department of Youth Services, to designate certain facili-

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[7]It should be noted that my opinion is limited to the extent of representation afforded in actions for personal injury damages. In damage actions brought against a state officer or employee for other types of injuries allegedly caused by the employee's performance of his official duties, representation by this Department is not as restricted, and may be covered by the general language of G.L. c. 12, §3.

[8]However, I think it important to point out that G.L. c. 12, §3B explicitly provides that for purposes of that and the following section (i.e., §3C), an officer or soldier in the Commonwealth's military forces "shall while performing any lawfully ordered military duty be deemed to be an officer or employee of the Commonwealth. . . ."

[9]*Compare* 1975 H. Rep. Doc. 3854 (94th Cong., 1st Sess.), a bill proposing to establish an exclusive remedy for damages for personal injury and death allegedly arising from the malpractice or negligence of medical members of the United States Armed Forces on active duty. The proposed new law would require the United States Attorney General to represent any such member of the active armed forces in the civil malpractice actions described. The United States House of Representatives passed the bill in July, 1975, and it is now pending in the Senate.

ties for the temporary detention and custody of juveniles. Specifically, you ask:

> 1. Whether you may designate particular locations within the Commonwealth to receive and detain police arrests; and
> 2. Whether you may designate particular locations within the Commonwealth to receive and detain court referrals.

You state that "[s]ome courts and police departments continue to send children to locations formerly used for purposes of detention, when, in fact, private contractors have been designated by the Department to receive children in a detention status".

The detention of juveniles arrested by the police is governed by G.L. c. 119, §67. This section provides in part that a child who has been arrested and is to be detained,

> . . . shall be detained in a police station or town lockup, or place of temporary custody commonly referred to as a detention home of the department of youth services, or any other home approved by the department of youth services pending his appearance in court.

The section also provides that detention facilities for children at police stations or town lockups shall be inspected annually by the Department and approved in writing by the Commissioner.

General Laws, c. 119, §68B provides that:

> The department of youth services may use or provide special foster homes and places of temporary custody commonly referred to as detention homes, at various places in the commonwealth which shall be completely separate from any police station, town lockup or jail, and which shall be used solely for the temporary care, custody and study of children committed to the care of the department of youth services. The commissioner of youth services may at his discretion transfer any child thus committed from any foster home or detention home to another such foster home or detention home.

I have found no statute that would prohibit you from designating a particular location to receive police arrests, so long as the designated location qualifies under G.L. c. 119, §67 as a "detention home" or a "home approved by the department." However, because Section 67 is written in the alternative, I do not believe your designation would be binding upon the police. The police could, consistent with this section of the statute, detain a child at approved juvenile facilities at the police station or town lockup. In this case, you would have no authority to order the child transferred to the designated location. Alternatively the police could deliver the child to any detention home or home approved by the Department. In this case, you would have authority under G.L. c. 119, §68B to order the child transferred to the location designated to receive police arrests. *See* 1973 Op. Atty. Gen. No. 73/74-13 (September 20, 1973).

The detention of juveniles temporarily committed to the care of the Department pursuant to a court order, and your authority to designate

particular locations to receive such court referrals, is similar to that described above with respect to police arrests. General Laws, c. 119, §68 provides that:

> A child between seven and seventeen years of age held by the court for further examination, trial or continuance, or for indictment and trial . . . or to prosecute an appeal to the superior court, if unable to furnish bail, shall be committed by the court to the care of the department of youth services. . . .
>
> The department of youth services may provide special foster homes, and places of temporary custody commonly referred to as detention homes of the department of youth services for the care, maintenance and safekeeping of such children between seven and seventeen years of age who may be committed by the court to said department under this section; provided, that no more than five such children shall be detained in any such special foster home at any one time. . . .

Since this section of the statute does not specify the place of commitment within the Department and since no other statute appears relevant, you have the authority to designate a particular location to receive court referrals. The location you designate must, however, conform to the requirements of G.L. c. 119, §68. Although your designation would not be binding upon a court, you would have authority under G.L. c. 119, §68B to order children committed to other homes transferred to the designated home.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 4. August 3, 1976

Paul A. Chernoff, Chairman
Massachusetts Parole Board
100 Cambridge Street
Boston, Massachusetts

Dear Mr. Chernoff:

You have requested my opinion on five questions concerning the scope of the Parole Board's jurisdiction over sentencing. I will answer each question separately.

Split Sentences

1. Regarding "split sentences,"[1] so-called, you have asked three questions. The first is:

> "Does the so-called 'split sentencing' law, Chapter[s] 347 [and 459] of the Acts of 1975, which empowers a court to suspend a portion of a sentence and to commit the individual on the balance of the sentence, deprive the Parole Board of jurisdiction

[1] A "split sentence" permits suspension of any part of a fine or any part of imprisonment, a flexibility which was not available to courts prior to the enactment of St. 1975, c. 347 and c. 459.

to issue a parole permit, the source of the prospective jurisdiction being Chapter 127, §128 of the General Laws?"

I answer this question "no." General Laws, c. 127, §128 confers jurisdiction on the Parole Board to grant parole permits to prisoners in certain institutions. It makes no reference to the type of sentence the prisoners are serving. I conclude, therefore, that the Legislature intended to grant the Board jurisdiction over all prisoners described in that section, regardless of the type of sentence being served. By the plain language of this statute, it is irrelevant to the Board's jurisdiction that a prisoner is serving a split sentence.

I find nothing in the legislative history of the split sentencing law to alter my view as to the effect of the language of §128. In enacting the split sentencing law, the apparent intent of the Legislature was to provide a sentencing judge with additional flexibility in prescribing rehabilitative and correctional services for offenders. *See* 49 Mass. Judicial Council Rep. 154-55 (1973). This legislative purpose is in no way restricted by continuing to give effect to the language in G.L. c. 127, §128 which authorizes the Board to grant parole permits. I believe, therefore, that the Legislature did not intend to limit or alter the scope of the Board's jurisdiction under §128 in passing the split sentencing law.

2. Your second question regarding split sentences is the following:

"Assuming that your answer to question number one is 'no', is the jurisdiction of the Parole Board to issue parole permits based on the total sentence, or only that portion of the sentence that is executed?"

The Legislature has conferred on the Board the authority to grant parole permits to eligible persons "at such time as the [B]oard in each case may determine" within certain established boundaries, G.L. c. 127, §133. It has also conferred rule-making power on the Board, G.L. c. 127, §151A(5). Historically, and, I believe, correctly, the Board has exercised this power to establish rules regarding parole eligibility, except where the terms of eligibility are specifically set by statute. While the Board's jurisdiction is based on the total sentence, the Board in its discretion may also adopt reasonable eligibility rules for those held on split sentences.[2]

There are, however, two important limitations on the Board's power to promulgate rules concerning parole eligibility. The first is contained in G.L. c. 127, §133, which specifies that prisoners held on sentences containing a minimum may not be considered for parole until they have served that portion of the minimum sentence specified in the appropriate clause of the section. By its clear terms, §133 applies to split as well as total sentences. If, therefore, a prisoner is held on a split sentence subject to this statute and the committed portion of his sentence is less than that portion of the minimum he is required to serve, he will be released on

[2]The Board may, for example, rule that prisoners held on split sentences are not eligible for a parole in certain circumstances, *cf.* 28 CFR §2.8. On the other hand, the Board may rule that such persons become eligible for parole after serving some specified portion of their commitment. Of primary importance is that the Board adopt some rule and make it known to judges who impose sentences.

probation before he is eligible for parole. The Board may not alter the effect of §133 by rule or regulation.

The second restriction on the Board's rule-making power is imposed by Article I of the Massachusetts Declaration of Rights and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Any rule the Board adopts must guard against the possibility that the split sentencing law will be utilized to decrease a prisoner's eligibility for parole. In other words, the rule must provide that a prisoner who is held on split sentence will be eligible for parole no later than a prisoner held on an unsplit sentence of the same length.[3]

3. Your third question regarding split sentences is the following:

"Assuming that your answer to question number one is 'no', is the 'total aggregate of sentences of twelve months or more', set forth in Chapter 127, §128 of the General Laws with respect to district court commitments to houses of correction, computed on the basis of the executed portion of the 'split sentence' or upon the total sentence?"

General Laws, c. 127, §128, reads, in pertinent part:

Subject to other provisions of law, parole permits . . . may be granted as follows: — . . . to all . . . prisoners . . . sentenced [by a court other than the superior court] to jails or houses of correction for one year or more, or for a total aggregate of sentences of twelve months or more, by the parole board.

This statute expressly refers to the "sentence" imposed upon a prisoner; it does not make any reference to the committed portion of the sentence. I perceive no reason why the language of §128 should not be given its plain and ordinary meaning. If the Legislature had intended to alter the impact of the section, it could have done so when it enacted the split sentencing law. In the absence of such legislative action I conclude that the Board has jurisdiction to grant a parole permit to any prisoner or house of correction who has been sentenced to an aggregate term of twelve months or more. This is true even though a portion of the sentence is suspended.[4]

AGGREGATION OF SENTENCES

4. You have further requested my opinion as to the following matter:

"Does the decision of the Supreme Judicial Court in the case of *Henschel v. Commissioner of Correction* [Mass. Adv. Sh.

[3]Consider, for example, a prisoner who is sentenced to a term of one year, of which eight months are committed and the remainder suspended. Under an existing rule of the Board a prisoner held on a sentence of one year to a house of correction is eligible for parole after six months. Any rule adopted to govern split sentences must provide that the prisoner held on this split sentence would be eligible for parole no later. He cannot be required to serve the full eight months without being considered for parole.

[4]I wish to make clear, however, that in answering the Board's question, I express no opinion as to the method the Board should use in computing parole eligibility. The fact that the Board has obtained jurisdiction over a prisoner by aggregating his sentences does not require that it aggregate the sentences for the purpose of computing parole eligibility. It is the Board's responsibility to decide how parole eligibility is to be computed and to announce its policy so that judges and other officials may rely upon it. *See* G.L. c. 27, §5(f). The Board's authority in this matter is, of course, subject to constitutional requirements; but it would be constitutional for the Board to adopt a rule that split sentences are not aggregated. *See* Federal Bureau of Prisons, Sentence Computation Manual, §7617.1, p. 3 (1972).

> (1975) 1982] require the Parole Board to aggregate for the purpose of determining parole eligibility, consecutive sentences to different county institutions?"

With some hesitation, I answer this question "yes." The *Henschel* case clearly holds that the Board may aggregate sentences to different correctional institutions for the purpose of computing parole eligibility. There is some question, however, whether the case goes beyond this and holds that the Board *must* aggregate such sentences. The case is not directed specifically to this point. Nevertheless, I believe that the reasoning underlying the court's decision implies that the Board is required to aggregate sentences to different institutions.

A substantial portion of the court's opinion in *Henschel* is devoted to its analysis of the legislative history of G.L. c. 127, §133 and the relationship of that section to other provisions in Chapter 127. Of particular relevance to your question is the court's treatment of G.L. c. 127, §130. This section provides, in part:

> No prisoner shall be granted a parole permit merely as a reward for good conduct but only if the board or officer having jurisdiction is of the opinion that there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society. A prisoner to whom a parole permit is granted shall be allowed to go upon parole outside prison walls and enclosures upon such terms and conditions as the board or officer having jurisdiction shall prescribe . . . .

The court suggests that the effect of this statute is to require that the Board make a single decision as to the time a prisoner is to be returned to society. *Henschel, supra*, Mass. Adv. Sh. (1975) at 1991; the court implies that the Board is not empowered to make a series of decisions moving a prisoner from place to place as it would be required to do if subsequent sentences to other institutions were viewed merely as detainers. The failure of the statutes governing the parole system to require the Board to aggregate sentences to different institutions is explained in the *Henschel* case by pointing to the legislative history of the statutes, *id.* at 1989-91. As the court observes, the various sections of Chapter 127 governing parole eligibility were enacted at different times and do not constitute a comprehensive scheme; thus, it is not surprising that they fail specifically to mention aggregation of terms to different county institutions. In light of the Court's reasoning, however, I conclude that in order to perform the duties imposed upon it by these statutes, the Board must aggregate such sentences to determine parole eligibility.

WEEK-END SENTENCES

5. Your final question concerns the Board's jurisdiction over sentences which are to be served on an intermittent basis such as those authorized under G.L. c. 273, §1, which permits a judge to impose a sentence of imprisonment upon a person and order that it "be served during such

hours as will permit said person to continue his employment." These types of sentences are often referred to as "week-end" sentences, and your question reads:

> "What is the Parole Board jurisdiction, if any, with respect to so-called 'week-end sentences', either when the sentence is imposed as a condition of probation or when it is not imposed as a condition of probation?"

Before answering your question, I have serious doubts that a "week-end" sentence may be imposed "as a condition of probation," and, therefore, would construe, if possible, such a sentence as a split sentence pursuant to Chapters 347 and 459 of the Acts of 1975. If such a construction is impossible, then it is my opinion that the Parole Board has no jurisdiction and must leave the matter to be resolved by the Probation Department and the courts.

When a person has been sentenced (either on a straight or split basis) to serve a sentence intermittently, the Parole Board may grant a parole permit if the sentence is within its jurisdiction as defined in G.L. c. 127, §128. In resolving this issue, the Board should determine what sentence the judge intended to impose. Thus, the example you mention in your letter ("a term of one year to be served on week-ends") may be construed in three ways.

1. A sentence of 365 days, to be served on 182 and ½ week-ends;

2. A sentence of 104 days, to be served on 52 week-ends;

3. A sentence of one year, of which 104 days is committed and the remainder suspended.

Each of these sentences requires a different treatment. It is the responsibility of the Board to determine which the judge intended and to act accordingly.

The first example must be treated like any other one year sentence. Under current rules, the prisoner would be eligible for parole when he has served one-half the term.

The second example must be treated like any other sentence of 104 days. If imposed by a Superior Court, it is within the Board's jurisdiction; if imposed by a court other than a Superior Court, it is not.

The third example must be treated like any other split sentence. As discussed above, the Board should promulgate rules to deal with such sentences.

In summary, I perceive no difference between sentences which are to to be served intermittently and those which are to be served continuously. There may be difficulties in ascertaining the intention of the sentencing judge, but once that intention has been determined, the parole rules which would apply to a continuous sentence also apply to the intermittent one.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 5. September 9, 1976

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

You have requested my opinion on two questions of law relating to the manner in which local elections officials are to count "sticker" votes. A sticker is a printed, pre-pasted label which an individual who wishes to vote for a candidate whose name does not appear on the ballot may affix to his or her ballot in lieu of writing in the name and address of that candidate. The laws of the Commonwealth specifically provide that individuals may cast their ballots by using such stickers. *See,* Mass. Gen. Laws c. 53, §§35[1] and 35A and c. 54, §§41-44, 65 and 77.[2] But, the statutes are general in form and do not provide clean-cut answers to your particular questions. Specifically, you have asked:

> 1. Must votes be counted if a voter votes by using stickers with a preprinted [X] on them, and otherwise votes in the appropriate manner?
>
> 2. Must sticker votes be counted if the sticker is placed on the ballot under the office to be filled, but is placed vertically over any other names, or diagonally over same, or near the office designation or in a place other than the appropriate one?

I answer your first question in the affirmative. In reaching this conclusion, I have been guided by the "cardinal rule" for guidance of election officers:

> If the interest of the voter can be determined with reasonable certainty from an inspection of the ballot . . . effect must be given to that intent and the vote counted in accordance therewith, provided the voter has substantially complied with the requirements of the election law. *O'Brien* v. *Election Commissioners of Boston,* 257 Mass. 332, (1926).

Although no reported case in the courts of the Commonwealth has attempted to apply this rule to the issue posed by your first question, in my opinion, its application would clearly require counting ballots containing premarked stickers. My opinion is buttressed by a recent unreported decision of the Massachusetts Superior Court directly holding that premarked stickers should be counted under Massachusetts law (*Bowen* v. *Registrars of Voters of Millville,* Moynihan, J.).

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[1]Mass. Gen. Laws c. 53, §35 provides in pertinent part:
A cross (X) marked against a name shall constitute a vote for the person so designated.

[2]Mass. Gen. Laws c. 54, §77 provides in pertinent part:
The voter on receiving his ballot shall . . . prepare his ballot by marking a cross (X) in the square at the right of the name of each candidate for whom he intends to vote or by inserting the name and residence of such candidate in the space provided therefor and making a cross in the square at the right. . . .

The same conclusion was reached by the Arkansas Supreme Court in a well-reasoned opinion interpreting the provisions of a sticker statute substantially the same as Mass. Gen. Laws c. 53, §77. In the only reported decision in any jurisdiction dealing specifically with the problem of the validity of premarked stickers the court opined:

> The only question is whether the (X) may be placed on the sticker before the voter enters the polling place. We hold that it may be. . . . What the statute requires is that the voter mark his ballot inside the polling place. Here the marking of the ballots was accomplished by the affixation of stickers. As long as that substantive step was taken inside the polling place, it made no difference under either the letter or the spirit of the statute, when or where the marking of the (X) mark took place. *Pace* v. *Hickey,* 236 Ark. 792, 370 S.W. 2d 66, 67 (1963).

Based on these judicial precedents and my own view of the Massachusetts law, I conclude that premarked stickers should be counted.

I must respectfully decline to answer your second question. In essence, it asks whether a sticker should be counted if it appears under the appropriate office to be filled, but is otherwise imperfectly placed. I decline to render an opinion on the question because determination of the actual intent of a voter is a question of fact which should be made in the first instance by local election officials on a case by case basis.

Two cases decided by the Supreme Judicial Court provide guidance for those officials. In *Ray* v. *Registrars of Voters of Ashland,* 221 Mass. 223 (1915) the Court held that a sticker placed over the name of a candidate appearing on the ballot accompanied by an (X) marked alongside the sticker could properly be counted for the sticker candiate. In *O'Brien* v. *Election Commissioners of Boston,* 257 Mass. 332 (1926) the Court considered several variations of irregular sticker votes and validated some while invalidating others. In both instances, the Court sought merely to ascertain whether the ballot as cast manifested the clear intent of the voter. Like the Court, I conclude that the provisions of Massachusetts law for casting one's ballot are directory rather than mandatory, and that ballots should be counted whenever there is substantial compliance with the law and a clear indication of the voter's intent.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 6. September 17, 1976

Vincent J. Piro, Chairman
Committee on Taxation
House of Representatives
State House
Boston, Massachusetts

Dear Chairman Piro:

With respect to your duties as House Chairman of the Committee on Taxation, you have requested an opinion concerning the income taxation of certain "nominee trusts". You describe these trusts as "trusts or trustees which act as agent or nominee for and under the control and direction of their beneficiaries." Attached to your request is a copy of a draft bill which the committee has under consideration and which would effect various changes in the existing scheme of income taxation of trusts. The two principal issues raised by your questions relate to the income taxation of "nominee trusts" under G.L. c. 62, §10 as presently written and the potential taxation of such trusts if the bill before your committee is enacted.

I have been informed that the issue raised with regard to the present state of the law is the subject of a case presently before the Appellate Tax Board. In the case of *Drucker* v. *State Tax Commission,* App. Tax Bd. Nos. 73670, 6361, the board ordered an abatement to be made to the beneficiary of a nominee trust because the losses of the "nominee trust" were attributable to the taxpayer-beneficiary. The Board has not yet issued an opinion in that case. I am also informed that an appeal is likely to be taken by the State Tax Commission in the *Drucker* case. In the ordinary course, one of my Assistant Attorneys General would represent the Commission before the Supreme Judicial Court in any such appeal. The issuance of an opinion by me in these circumstances would unduly complicate the administrative proceedings and would be premature in light of the possibility of judicial resolution. I must, therefore, respectfully decline to answer your first question.

The second question you ask relates to the effect of the enactment of the revised bill attached to your request. This bill would substantially change the Commissioner of Corporation and Taxation rule of taxing the trust and in its place adopt the federal system found in the Internal Revenue Code of 1954, §§71-678. Under such a system, the beneficiary is taxed if any number of circumstances are present. Briefly, they are:

(a) The trust income is distributable to or accumulated for the benefit of the grantor or the grantor's spouse;

(b) The grantor holds a reversionary interest in the trust which is not postponed beyond a ten-year period;

(c) The grantor has the power to revoke the trust in his favor;

(d) The grantor has the power to control the beneficial enjoyment of the trust corpus or income;

(e) The grantor has retained certain administrative powers with respect to the trust; and,

(f) A person, other than the grantor, has the power to obtain the trust corpus or income.

The "nominee trust" would ordinarily come within the terms of a, b, c, d and e. Thus, the bill in question would assure that in a nominee trust situation tax liability or benefit would pass through the trustee to the beneficiary.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 7. September 24, 1976

The Honorable Paul Guzzi
Secretary of the Commonwealth
State House
Boston, Massachusetts 02133

Dear Secretary Guzzi:

By letters dated September 7, 1976, you have asked me whether certain questions are ones of public policy in accordance with section 19 of Chapter 53 of the Massachusetts General Laws. It is my opinion that the questions presented, as modified for reasons of form, see *infra* pp. 2-5, are important public questions in which every citizen of the district or the Commonwealth has an interest, are fit subjects for lawmaking and, therefore, are questions of "public policy" which may be submitted to the voters if all other statutory requirements are met. See 1939 Opinions of the Attorney General, pp. 99-100; 1955 Opinions of the Attorney General, pp. 51-52. See, also, 8 Opinions of the Attorney General 1928, pp. 490-492; 1965 Opinions of the Attorney General, pp. 92-93.

The requirements to which I make reference are contained in G.L. c. 53, §§19, 20 and 21, and involve a number of statutory prohibitions specifically set out in these sections. For example, a question may be technically accurate and present an important public policy issue; however, if the question is substantially the same as one which has been submitted to the voters within less than three years, it shall not appear on the ballot. G.L. c. 53, §21.[1] I have made no independent inquiry to determine whether these questions are statutorily defective for any reason other than a failure to qualify as a public policy question in proper form for presentation on the ballot. See 1958 Opinions of the Attorney General, p. 44.

1. *Nuclear Power Question — 4th Hampshire Representative District*

In my opinion the statement that nuclear plants are unsafe and uneconomical is overly broad and inappropriate as an opinion which is subject to controversy. Further, public policy questions do not extend to matters in jurisdictions beyond the Commonwealth. I would, therefore, suggest the following language on this question:

[1]As Secretary of State you have in your possession past election ballots of the Commonwealth and are, therefore, in the best position to make such a determination. If you find that a question does not meet the requirements aforementioned, it should not be printed on the ballot.

Shall the Representative from this District be instructed to vote to oppose the construction of nuclear fission power plants in the Commonwealth in general and in Montague and Plymouth in particular on the grounds that such plants are allegedly unsafe and uneconomical?

II. *Abortion Question — 24th Norfolk Representative District*

In my opinion, it is inappropriate to refer to the decisions of the Supreme Court in the abstract on the ballot itself. I would, therefore, suggest the following language on this question:

Shall the Representative from this District be instructed to vote to support and ratify an amendment to the United States Constitution permitting the states to prohibit abortions and to affirm the right to life to the unborn?

III. *Cigarette Tax/Lead Paint Question — 53d Middlesex Representative District*

In my opinion, the question as presently drafted is not in such simple, unequivocal and adequate form so as to be best suited for presentation upon the ballot. G.L. c. 53, §19. It is my recommendation that the language read as follows:

Shall the Representative from this District be instructed to vote to approve the passage of a bill increasing the state tax on cigarettes sold in Massachusetts by one cent per package, said tax money to be used to eliminate childhood lead paint poisoning in the Commonwealth?

IV. *Solid Waste Question — 15th and 16th Essex Representative Districts*

In my opinion, the proper form of this public policy question for presentation to the voters of the 16th Essex Representative District is as follows:

Shall the Representative from this District be instructed to vote to approve the passage of legislation allowing a city (or town) to construct a solid waste facility larger than is necessary for servicing the inhabitants of said city (or town) absent a prior vote in favor thereof by a majority of the voters in said city (or town)?

V. *Boston City Council Question — 25th, 26th and 27th Suffolk Representative Districts*

In my opinion, a public policy question should appear on the ballot in the form of an instruction to the legislator of the applicable district, notwithstanding the fact that any such instruction is non-binding unless the question submitted receives a majority of all the votes cast at that election. G.L. c. 53, §22. I would, therefore, suggest the following language on this question:

Shall the Representative from this District be instructed to vote to approve the passage of a bill requiring that the majority of the members of the Boston City Council be elected by geographic districts of equal population?

VI. *Abolition of County Level of Government Question — 1st Essex Senatorial District*

In my opinion, the statements relative to eliminating an overlap of services so as to nullify the cost of allegedly ineffective county run programs as well as the reference to disorganization and potentially lower taxes are inappropriate. I would, therefore, recommend an abbreviated form of the question to read as follows:

> Shall the Senator from this District be instructed to support and vote in favor of legislation, including any necessary constitutional amendments, abolishing the county level of government?

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 8. September 27, 1976

The Honorable Kevin B. Harrington
Office of the Senate President
State House
Boston, Massachusetts
Edward B. O'Neill, Senate Clerk
Office of the Clerk of the Senate
State House
Boston, Massachusetts

Dear Senate President Harrington and Mr. O'Neill:

I respectfully render the following opinion in response to the Order of the Senate which provides:

> *Ordered,* That the attorney general of the commonwealth be forthwith requested by the senate to render an opinion to be delivered to the president and clerk of the senate at the earliest possible date, on the following question: —
> Whereas item 4402-5000, of chapter six hundred and eighty-four of the acts and resolves of nineteen hundred and seventy-five, [1] for a medical assistance program, provides that all federal funds received for the purpose of this item shall be credited to the General Fund; and further provides that no expenditure or commitment made pursuant to this item or to any agreements authorized by chapter eight hundred of the acts of nineteen hundred and sixty-nine, [2] for the purpose of complying with the provisions of Public Law 89-97, Title XIX, [3] shall be incurred in excess

[1]Acts of 1975, c. 684, Item 4402-5000, appropriated $410,000,000 for a "medical assistance program" for fiscal year 1976, conditioned on the provisos described in the Order of the Senate.

[2]Acts of 1969, c. 800 amended the General Laws by inserting Chapter 118E, entitled "Medical Care and Assistance."

[3]42 U.S.C. §§1396, *et seq.*

of available funds which have been appropriated therefor; and further provides that all judgments, appeals and rate changes for services provided in a prior year but finally determined during the current fiscal year may be paid from this account, subject to the approval of the house and senate committees on ways and means; and further provides that optional services allowed under this item may be phased out at the discretion of the commissioner of public welfare consistent with the funding level of this item; and further provides that the medical needy program so-called in this item shall cease effective January thirty-first, nineteen hundred and seventy-six unless a certification is made by the commissioner of administration that sufficient funds are available from either state or federal sources to warrant the continuation of the program and that this item is increased by appropriation to properly fund said continuation:

Does the commissioner of administration have the statutory authority to certify the expenditure of funds by the commissioner of public welfare for said medical assistance program, and the commissioner of public welfare to expend funds or to incur expenditures or obligations for said medical assistance program, in excess of the amounts appropriated therefor, in chapter six hundred and eighty-four of the acts and resolves of nineteen hundred and seventy-five and therefor must the commissioner of administration and the commissioner of public welfare cease to incur expenses or obligations until such time as further funds have been appropriated for this item?

This opinion addresses two questions posed by the Order of Senate.[4] Those questions are restated below and answered as indicated.

1. Q: Does the Commissioner of Public Welfare have authority to expend funds or incur obligations for the medical assistance program established by G.L. c. 118E in excess of the amount appropriated in St. 1975, c. 684, Item 4402-5000?

A: No.

2. Q: If and when the total appropriated amount is expended and committed, must any further expenditure of funds, or incurring of obligations for the medical assistance program cease until additional funds have been appropriated by the Legislature for the program?

A: Yes.

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[4]The Order of the Senate also asks a third question:

Does the Commissioner of Administration (the Secretary of Administration and Finance) have authority to certify the expenditure of funds by the Commissioner of the Department of Public Welfare for the medical assistance program established by G.L. c. 118E exceeding the amount appropriated in St. 1975, c. 684, Item 4402-5000?

As I read this question, the Secretary's "authority to certify the expenditure of funds" refers to something other than the certification that sufficient funds are available to warrant continuation of the medical needy program, referred to in the first paragraph of the Order. The statutory source of the Secretary's "authority to certify the expenditure of funds" is not, however, set forth in the Order; nor is it otherwise apparent. It may be that this "authority to certify" refers to the allotments made by the Governor or the Secretary of Administration and Finance pursuant to G.L. c. 29, §9B. But since the statutory language actually conferring such authority would be material to an attempt to define its limits, I prefer not to speculate and decline to answer this question in its present form.

The Constitution of the Commonwealth evidences a fitting concern for the commitment, expenditure and control of public funds. It vests exclusive power in the Legislature to appropriate funds for maintaining state government, Const., Part 1, art. 23; Part 2, c. 1, §1, art. 4, and §3, art. 7, and expressly provides for legislative control and supervision of all state expenditures. Const., art. LXIII of the Amendments. In addition, the payments of monies from the treasury can be made only by warrant of the Governor with the advice and consent of the Council, and "agreeably to the acts and resolves of the general court." Const., Part 2, c. 2, §2, art. 11.

Pursuant to its constitutional grants of power, the Legislature has enacted various statutes which limit the commitment and expenditure of state funds. Notable among these are §§9B, 12, 18, 26, 27, 63 and 66 of Chapter 29 of the General Laws. In particular, Section 26 provides that expenses of state offices and departments shall not exceed legislative appropriations or executive allotments, and that no obligation incurred in excess of either shall impose any liability on the Commonwealth.

> These provisions, and specifically Section 26, are designed to require an official or department to keep expenditures within the amount appropriated and to protect the public credit by preventing the incurring of any indebtedness against the Commonwealth for the payment of which no provision had been made by the Legislature.

Baker v. Commonwealth, 312 Mass. 490, 493 (1942). *See United States Trust Co. v. Commonwealth*, 348 Mass. 378, 380-81 (1965); *Opinion of the Justices*, 323 Mass. 764, 767 (1948).

In accordance with this interpretation, opinions of my predecessors in office have consistently maintained that a state officer or department may not expend funds or incur obligations in excess of appropriations. *E.g.*, 1970-71 Op. A.G., p. 119 (June 17, 1971); 1966-67 Op. A.G., p. 181 (Mar. 22, 1967); *id.* p. 154 (Feb. 14, 1967); 1965-66 Op. A.G., p. 145 (Oct. 7, 1965); 1961-62 Op. A.G., p. 76 (Sept. 11, 1961); 1959-60 Op. A.G., p. 76 (Jan. 21, 1960); *id.*, p. 73 (Jan. 19, 1960); 1959-60 Op. A.G., p. 63 (Nov. 25, 1959); 1949-50 Op. A.G., p. 15 (Aug. 9, 1949); III Op. A.G., p. 226 (Apr. 26, 1909).

Given the consistent history of legislative limitation on administrative spending power,[5] it is apparent that a grant of authority to the Commissioner or the Department of Public Welfare to expend funds or incur obligations in excess of appropriations (assuming such a grant were constitutional) would be both novel and extraordinary.

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[5]The Acts of 1975, c. 684, evidences the same legislative concern for control of expenditures as that expressed in G.L. c. 29 and other previously enacted statutes. Thus, for example, c. 684, §1 provides that the enumerated appropriations are made "subject to the provisions of law regulating the disbursement of public funds and the approval thereof;" §23 subjects a secretary who incurs total commitments in excess of available funds to a fine or removal from office; turning specifically to the Department of Public Welfare, Item 4400-1000 requires the Commissioner of that Department to "report in writing to the governor the total expenditures of his department for each month within thirty days after the end of each month."

An examination of the statutes establishing and funding the medical assistance program, however, reveals no attempt by the Legislature to grant such authority. In fact, the opposite is true: the Legislature has explicitly restated the well-established limitation on Department of Public Welfare expenditures in Chapter 118E. For example, §3 provides that the Department shall cooperate with federal authorities in the administration of the medical assistance program "within the limits of the funds which have been appropriated for the purpose of this chapter;" §4 provides that the Department shall take such action as is necessary to conform with the requirements of Title XIX, but must do so "within the limits of available funds appropriated for this chapter;" and finally, as noted in the Senate's Order, the specific Fiscal 1976 appropriation for the medical assistance program operated under G.L. c. 118E, Item 4402-5000, provides "that no expenditure or commitment made pursuant to this item . . . shall be incurred in excess of available funds which have been appropriated therefor."

To conclude, I am of the opinion that under Massachusetts law the Commissioner of the Department of Public Welfare could not expend funds or incur obligations in Fiscal 1976 for the medical assistance program in excess of the amount appropriated by Item 4402-5000. *Cf. Opinion of the Justices,* Mass. Adv. Sh. (1975) 2521, 2528. The only remaining question is whether federal law requires a different result.

The Commonwealth's existing medical assistance program was established pursuant to and in conformance with Title XIX of the Social Security Act, 42 U.S.C. §§1396 *et seq.* Title XIX, known as "Medicaid", provides for grants to states which have submitted to, and had approved by, the Secretary of Health, Education and Welfare state plans for medical assistance. 42 U.S.C. §1396. The stated purpose of the Medicaid program is to enable each state "as far as practicable" to provide assistance to its needy citizens. *Id.; Opinion of the Justices,* Mass. Adv. Sh. (1975) 2521, 2532. The approved medical assistance programs operated under it are administered by the state (42 U.S.C. §1396a), but are jointly funded by the states and the federal government. *Id.* §1396b. States are not required to operate such programs but if they elect to do so, they must comply with the requirements of Title XIX. *Id.* §§1396a and c. If the Secretary of Health, Education and Welfare determines that an approved state plan has been altered or is being administered in a manner that fails substantially to comply with federal law, he may terminate or reduce further payments to the state. *Id.* §1396c.

Title XIX does not set forth a specific amount of money which a state must expend for its medical assistance program. Nor does it explicitly require a state to make an open-ended appropriation[6] for its program or prohibit a state from limiting the amount of money that it will expend on the program during one fiscal year. The question, then, is whether Title

[6]I use the term "open-ended appropriation" to mean "without a specific dollar limitation", and not in the more limited sense, referred to in *Massachusetts General Hospital v. Sargent,* 397 F.Supp. 1056, 1060 (D. Mass. 1975), that a current year's Medicaid appropriations could be used to pay both current and prior years' obligations.

XIX imposes an implicit requirement on a state to spend a specific amount for its medical assistance program, or, stated conversely, whether the law impliedly prohibits a limitation on expenditures for one fiscal year. Based on a review of Title XIX and its accompanying regulations, my answer to this question (as stated in either form) is "No".

Title XIX provides that a state plan must make medical assistance available to all persons who qualify for categorical federal programs of cash assistance, 42 U.S.C. §1396a(10); in addition to these mandatory groups, a state plan may include several other classes of individuals. *Id.* Title XIX also provides that a state must, at a minimum, provide certain categories of medical services, *id.* §§1396a(13) (B), 1396d(a) (1) —(5); but a state may decide to provide additional categories as well. *Id.* §1396d(a). Nevertheless, the amount, scope, and duration of even the mandatory services are to be determined by the state. 45 C.F.R. §249.10 (5) (i). Although federal regulations require that items of medical care and services must be sufficient in amount, duration and scope reasonably to achieve their purposes, there is no requirement that they be provided for a specific period of time. Nor is there any federal requirement that a state plan be in effect for a full calendar or fiscal year.

In sum, Title XIX describes a group of persons who must be covered under a state medical assistance program as well as a minimum level of services which they must receive, but it does not mandate the length of time during which a state plan must be operated. Consequently, it cannot be said that federal law implicitly requires a reasonably foreseeable or specific amount of state expenditures on such a plan or, conversely, prohibits a limitation upon the expenditure of state funds.[7]

This conclusion is in accord with the view that the states must have the necessary flexibility to deal with their fiscal crises. This view was adopted by Congress in 1972 when it repealed 42 U.S.C. §1396a(d),[8] which had provided that a state could not reduce its expenditures for the state's share of Medicaid funds from one year to the next. The same principle has also been consistently recognized by the United States Supreme Court in cases concerning other programs of cooperative federalism under the Social Security Act. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 484-87 (1970); *Rosado v. Wyman*, 397 U.S. 397, 408 (1970); *King v. Smith*, 392 U.S. 309, 318-19 (1968).

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[7] *See Morris v. Williams*, 67 Cal. 2d 733, 433 P. 2d 697, 708-09 (1967); *California Medical Association v. Brian*, 30 Cal. App. 3d 637, 106 Cal. Rptr. 555, 568 (1973); *Briarcliff Haven, Inc. v. Department of Human Resources*, 403 F.Supp. 1355, 1363 (N.D. Ga. 1975). 42 U.S.C. §1396d provides that at the beginning of each quarter the Secretary shall estimate and pay to a state matching federal funds based upon anticipated state expenditure for the ensuing quarter. This estimate is based on a report by the state containing its estimate of the total sum to be expended in the quarter, stating the amount appropriated or made available by the state for such expenditures and, "if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, [identifying] the source or sources from which the difference is expected to be derived." I do not read this provision as requiring operation of a state plan for at least one quarter of a year.

[8] *See* 3 U.S. Cong. Admn. News 5086-87 (1972).

It is therefore my opinion that the provisions of Massachusetts law which prohibit the Commissioner of the Department of Public Welfare from expending funds or incurring obligations for the medical assistance program in excess of appropriated amounts do not conflict with any requirements of federal law. Accordingly, I have answered the first question posed above "no" and the second "yes."

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 9. October 14, 1976
Frank A. Hall, Commissioner
Department of Correction
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Hall:

You have requested my opinion on eight questions relating to transportation of prisoners to court. Specifically, you have asked:

1. Should Department of Correction (DOC) transportation officers be compensated by the county for the use of their own private vehicles at the rate of ten cents per mile or twenty cents per mile, for each mile driven in carrying prisoners to or from court?

2. Should DOC transportation officers be compensated by the county for each mile actually driven in their own private vehicles while transporting prisoners to or from court, or should they be compensated instead for mileage as measured on a standard shipper's and carrier's chart between the town in which the institution is located and the town in which the court is located?

3. Should DOC transportation officers be given extra compensation upon certification of need for extra security measures, or when the mileage allowance is manifestly inadequate, pursuant to G.L. c. 262, §47, and Superior Court Rule 10?

4. Should DOC transportation officers be given an extra allowance for mileage pursuant to G.L. c. 248, §48 in addition to compensation under G.L. c. 262, §21, when carrying more than one prisoner?

5. Are the various county courts bound by G.L. c. 248, §9 to certify in advance the expense which will be allowed in the service of a writ?

6. Is the DOC obligated to use state-owned vehicles and state-salaried correction officers in the service of a county writ without compensation by the county?

7. Is the county treasurer obligated pursuant to G.L. c. 213, §8 and c. 35, §12, to pay a bill for service of a writ as ordered by a justice of a county court, or may he adjust the bill at his discretion?

8. Should DOC transportation officers be compensated at the rate of twelve cents per mile pursuant to state regulation, or at the rate of twenty cents per mile pursuant to G.L. c. 262, §21, for the use of their own private vehicles in carrying prisoners on transfers from institution to institution, back to institution after parole violation or escape, or other transportation not pursuant to a habeas corpus writ?

I will answer each of the questions in order.

1. With respect to the amount of compensation to which DOC officers are entitled for the use of their private vehicles in transporting prisoners to or from court, it is my opinion that they should be compensated at the rate of twenty cents a mile for every mile the prisoner is actually in the custody of the officer and physically within the officer's vehicle. This would include the miles driven transporting a prisoner from an institution to a court, as well as from the court back to the institution, if a round trip is made by the same officer with the same prisoner.[1]

General Laws, c. 262, §21 governs the amount of reimbursement allowed an officer for the use of his private vehicle in transporting prisoners to or from a court.[2] The terms of the statute, as amended by St. 1959, c. 581, provide in pertinent part that:

> In the service of precepts in criminal cases, the officer shall be allowed the actual, reasonable and necessary expenses incurred in going *or* returning with the prisoner, and if he necessarily uses his own conveyance, he shall be allowed therefor twenty cents a mile for the distance traveled one way, except that in the service of such precepts of the district court of Chelsea, if he necessarily uses his own conveyance, he shall be allowed, if the distance traveled is less than ten miles, thirty cents a mile for the distance traveled, both ways; and if he uses the conveyance of another person he shall be allowed the amount actually expended by him therefor . . . (Emphasis supplied).[3]

[1]For example, if an officer drives from his home to an institution, picks up a prisoner, transports the prisoner to a Court and then continues to another assignment without the prisoner, he should be compensated only for the miles driven from the institution to the court during which time the prisoner is physically in the officer's automobile.

[2]Expenses incurred under this section are paid by the Commonwealth's counties. The provision in the Commonwealth's budget act for fiscal year 1977 (St. 1976. c. 283, §6), limiting the allowance to state employees for expenses incurred in operating their own automobiles on official business to twelve cents per mile, appears to apply only to expenses paid for by the Commonwealth and is therefore inapplicable. In any event, it is my opinion that the specific provisions of G.L. c. 262, §21 must take precedence over the more general language of Section 6 of the Budget Act in determining the expense allowance to be made for transporting prisoners to or from a court. *See e.g., Pereira v. New England LNG Co., Inc.* 364 Mass. 109 (1973).

[3]On its face, G.L. c. 262, §21 applies only to the service of precepts in criminal cases by sheriffs, deputy sheriffs and constables; however, G.L. c. 262, §43 provides that whenever any public officer performs a duty or service described in Chapter 262, he shall be reimbursed "at the rate prescribed in this chapter for like services." A precept is defined as a "command or mandate in writing", *Adams v. Vose*, 1 Gray 51, 67 Mass. 51 (1854), and includes all warrants and processes. *Id.* at 58.

I find this statutory language to be ambiguous when considered in relation to your question. The first part of this section — up to the clause referring to the Chelsea district court — refers only to the reimbursement rate an officer is to receive in "going" with a prisoner *or* in "returning" with a prisoner and speaks of the distance traveled "one way"; it does not explicitly address the question of a round trip. The clause concerning service of precepts of the Chelsea district court does, however, introduce the idea of mileage reimbursement for an officer's travel "both ways." The question posed by the juxtaposition of these two clauses is whether the Legislature intended an officer transporting a prisoner from an institution to a court — other than the Chelsea district court — and back again to be reimbursed at the rate of twenty cents a mile for only one or for both ways.

Basic principles of statutory interpretation require that when the language of a statute is ambiguous, resort may be had to certain aids in interpretation, including the legislative history. *See, e.g. Massachusetts Mutual Life Insurance Co. v. Commissioner of Corporations & Taxation,* 363 Mass. 685, 296 N.E. 2d 805 (1973). In the end, a statute must be construed so "as to make it an effectual piece of legislation in harmony with common sense and sound reason." *Morrison v. Selectmen of Weymouth,* 279 Mass. 486, 492, 181 N.E. 786 (1931); *Atlas Dist. Co. v. Alcoholic Beverages Control Commission,* 354 Mass. 408, 414, 237 N.E. 2d 609 (1967). Given my conclusion about the ambiguities in the language of §21, I have turned to the legislative history of that section to answer the question stated above.

The origins of §21 date back to 1860. St. 1860, c. 191, §3 provided that "expenses necessarily incurred and actually disbursed in the service of any precept shall be allowed and paid" to the officer performing the service. In 1862, the provision was amended to allow for both a fee and expenses in the service of precepts: if the distance traveled was less than twenty miles, the officer was to be paid a fee of five cents a mile each way, and the actual reasonable expenses necessarily incurred in "going or returning with the prisoner," not to exceed fifteen cents a mile for the distance traveled one way. It is clear that the statute contemplated an individual officer would himself be making only one trip with the prisoner, for the distances were to be computed "between the place of service and the place of return." St. 1862, c. 216, §1(3).

In 1882, the statute governing reimbursement for travel expenses in the service of precepts was amended again. St. 1882, c. 199, §9 first introduced the language similar to that found in the present statute:

> In the service of any precept in criminal cases, the officer shall be allowed the actual reasonable and necessary expenses incurred in going or returning with the prisoner, and, if he necessarily uses a horse and carriage, he shall be allowed not exceeding fifteen cents a mile for the distance traveled one way, to be included in such necessary expense. . . .

The reference to horse and carriage is significant. The statute was written in an era preceding automobile transportation. Distances were not covered as quickly or conveniently as they are today. It is reasonable to assume that the legislators in 1882 did not contemplate prisoners would be carried round-trip in the same day from prison to court and back to prison. Payment was to be made for the distance required when the prisoner was actually being transported, either in going *to* court or in returning *from* court.

The language of the 1882 statute was substantially repeated in amendments made in 1885 and 1930. The 1885 amendments included provisions requiring the officer to certify that it was necessary for him to use a horse and carriage in the service of the precept and that he actually did travel the distances reported. St. 1885, c. 254. In the 1930 amendments, the term "conveyance" was substituted for the terms "horse and carriage", and the amount of reimbursement was increased to "twenty cents a mile for the distance traveled one way." St. 1930, c. 370.

The most recent amendment to G.L. c. 262, §21, namely St. 1959, c. 581, added the particular proviso concerning Chelsea district court. It is this proviso that causes the ambiguity at issue here in introducing the concept of reimbursement for distances traveled "both ways." It is my opinion, however, that the specific proviso in St. 1959, c. 581 regarding the district court of Chelsea is not inconsistent with my interpretation of G.L. c. 262, §21, discussed above. Rather, the proviso merely recognizes and distinguishes a special situation anticipated by the Legislature with regard to the relatively short distances traveled in transporting prisoners to or from Chelsea.

In sum, when G.L. c. 262, §21, as amended by St. 1959, c. 581, is read in its entirety, common sense and sound reason dictate the following interpretation: "In the service of precepts in criminal cases, an officer who necessarily uses his own vehicle should be reimbursed at the rate of twenty cents a mile for the distance traveled one way in transporting a prisoner from one point to another; and, if he returns the prisoner to the point of origin, either in response to the original precept or in response to a second precept, he is to be reimbursed at the rate of twenty cents a mile for the return trip as well; except that, if the service of the precept requires transporting a prisoner to or from the Chelsea District Court and the distance covered is less than ten miles, the officer is to be reimbursed at the rate of thirty cents a mile for the distance traveled both ways, regardless of whether he transports a prisoner on the return trip."

2. In answer to your second question concerning the measurement of mileage for which reimbursement must be paid, I am of the opinion that G.L. c. 262, §21 requires payment based on miles actually traveled.

As noted above, §21 provides that:

> In the service of precepts in criminal cases, the officer shall be allowed the *actual, reasonable* and *necessary* expenses incurred . . . (emphasis supplied).

Many county and state institutions are removed from the center of the nearest town. A standard shipper's or carrier's chart such as you describe in your question do not reflect these geographic realities. In light of the statute's express direction to reimburse for "actual expenses," reliance on these charts, without adjustment, would not appear to be permitted. Nevertheless, the terms "reasonable" and "necessary", which also appear in the statute, indicate that the DOC would not be precluded from developing rules or a mileage chart of its own that would standardize the number of miles between two institutions for which an officer might seek travel reimbursement. Such a chart could take into account whatever security considerations relating to the transportation of prisoners that the DOC thought appropriate.

3. With respect to your third question regarding extra compensation upon certification of need for extra security measures, or "when the mileage allowance is manifestly inadequate", I am of the opinion that the awarding of such extra compensation is entirely committed to the judgment and discretion of the superior court justice.

General Laws, c. 262, §47 provides that, on certain conditions, a superior court judge "may . . . allow extra compensation for any meritorious service for which fees allowed by law are manifestly inadequate. . . ." It is clear that the award of extra compensation pursuant to this section is at the discretion of the superior court judge, and it is beyond my authority to render an opinion which would compel or channel the performance of such a discretionary administrative act by a member of the judiciary.

4. In answer to your fourth question, I am of the opinion that G.L. c. 262, §48[4] does not allow for extra compensation in those situations where more than one prisoner is transported. That section of Chapter 262 clearly states that "if . . . two or more prisoners are conveyed at one time by the same officer, by virtue of mittimus, habeas corpus or state prison warrant . . . one traveling fee and one service only shall be allowed in conveying such additional prisoner or prisoners, in addition to the actual reasonable expense necessarily incurred."

In other words, the cost of transporting a prisoner is determined solely by the amount of mileage traveled. Reimbursement for a traveling fee is to be at the rate of twenty cents per mile for each mile a prisoner is actually carried (G.L. c. 262, §21). The number of prisoners carried does not increase the rate.

5. Your fifth question asks whether county courts are required by G.L. c. 248, §9 to certify in advance the expense which will be allowed.

General Laws, c. 248, §9 provides that a court or magistrate granting an application for a writ of *habeas corpus* must certify on the writ the amount to be paid for the expense of transporting the prisoner from the place of his confinement. That section also provides that, "the officer [who has custody of the prisoner] shall not be bound to obey the writ unless

[4]In your request, you refer to G.L. c. 248, §48 as the statutory source of your fourth question. I have assumed that you intended to refer to G.L. c. 262, §48, and have answered accordingly.

the amount [to be paid for the expense of transporting him from the place of imprisonment] is paid or tendered to him."

Your question concerns the obligation of a court. The Attorney General is responsible under G.L. c. 12, §3 for rendering opinions to state officials and state officers regarding their legal obligations, II Op. Atty. Gen. 100 (1899); courts are not considered "state officials" for purposes of these opinions. I Op. Atty. Gen. 603 (1898). Therefore, I must decline to answer this question.

6. In question six, you ask whether the DOC is obligated to use state-owned vehicles and state-salaried correction officers in the service of a county writ without compensation by the county.

I have not found any statute or regulation which would impose such an obligation. To the contrary, I have found certain statutory provisions that impose the costs of (1) committing all prisoners (G.L. c. 127, §122), (2) removing certain prisoners (G.L. c. 127, §123), and (3) transporting certain prisoners (G.L. c. 248, §40 and G.L. c. 276, §20M) on the counties. The relationship between the DOC and the counties regarding transportation of prisoners and reimbursement for the costs of such transportation is not clear. I am reluctant to answer this question without reference to a specific situation. However, it seems clear that a state-salaried DOC officer is not obligated to use his private vehicle in the service of a county writ without compensation from the county.

7. Your seventh question asks whether the county treasurer is obligated by G.L. c. 213, §8 and G.L. c. 36, §12 to pay a bill for service of a writ as ordered by a justice of a county court, or whether he may adjust the bill at his discretion.

On first impression both these statutes appear to require county treasurers to pay for services and expenses incurred in the sitting of court in the various counties. Like your fifth question however, this question also concerns the obligation of one who is not a state official, and for that reason I decline to answer it. *See* II Op. Atty. Gen. 100, *supra*.

8. In response to your final question, I am of the opinion that DOC transportation officers should be compensated at the rate of twelve cents per mile for the use of their own vehicles in carrying prisoners in any manner, except in the service of precepts provided for by G.L. c. 262, §21. Reimbursement for transporting prisoners from institution to institution, or back to an institution after escape or parole violation, or in any other way which would be considered a department transfer (as opposed to transfer in the service of precepts in criminal cases), is determined by G.L. c. 30, §25. The most recent amount established by the comptroller of the Commonwealth under the authority of that statute is twelve cents per mile.[5]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[5]This amount conforms to the Legislature's authorization for such expenses in the FY 1977 budget. *See* St. 1976, c. 283, §6, discussed above in n.2.

Number 10. October 21, 1976
Commissioner John Calhoun
Department of Youth Services
73 Tremont Street
Boston, Massachusetts

Dear Commissioner Calhoun:

You have requested my opinion on three specific questions of law, each raising the general question whether or not employees of your department may seek elective political office. You ask:

> 1. Does state or federal law prohibit a full-time state employee from seeking: (a) local, (b) state or (c) federal elective office?
>
> 2. Does state or federal law prohibit a full-time state employee from holding: (a) local, (b) state or (c) federal elective office?
>
> 3. Does the Department of Youth Services have the authority to promulgate a rule governing the ability of a full-time employee to seek or hold elective office?

In answer to your first question, there is no state law which prohibits state employees from seeking elective office. The Federal Hatch Act (5 U.S.C. §1502(a) (3)) does prohibit state employees from seeking elective office if the election is a partisan election, and the employee's principal job activity

> is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency . . . . 5 U.S.C. §1501(4)

Thus, to the extent that your employees are engaged in activities financed with federal funds, they violate the provisions of the Hatch Act if they seek partisan elective office.[1]

In answer to your second question, neither the Hatch Act nor any other federal law forbids per se a state employee from holding an elective office. In this connection, however, note should be taken of two federal cases, *Northern Virginia Regional Park Authority v. United States Civil Service Commission,* 437 F. 2d 1346 (D.C. Cir.), *cert. denied* 403 U.S. 936 (1971) and *In re Higginbotham,* 340 F. 2d 165 (3d Cir.), *cert. denied* 382 U.S. 853 (1965), both of which concern types of political activities in which elective office holders holding state jobs covered by the Hatch Act may not engage.

Turning to state law prohibitions on holding an elective office, G.L. c. 30, §21 provides that "a person shall not at the same time receive more than one salary from the treasury of the Commonwealth," and Article Two of Chapter Six of Part the Second of the Massachusetts Constitution further prohibits holding more than one position by certain elected officials. (The pertinent Article of the Constitution is attached as an addendum.) *See*

[1]Federal law, however, permits state employees as defined above to seek a nonpartisan elective office. See 5 U.S.C. §1503.

generally Opinion of the Justices, 332 Mass. 759 (1955). Nevertheless, Massachusetts law does allow for unpaid leaves of absence on the request of certain elected officials. *See, e.g.,* G.L. c. 31, §46E. Therefore, if your employees receive only one salary from the Commonwealth and do not trigger the specific prohibitions of the Massachusetts Constitution, they may hold elective office at any level.

I answer your third question in the affirmative. In my opinion the Commissioner of the Department of Youth Services does have the authority to promulgate a rule governing the ability of a full-time employee to seek or hold elective office. G.L. c. 18A, §1 provides in part that the Department:

> shall be under the supervision and control of a commissioner of youth services . . . [who] shall have full responsibility for the formulation and coordination of all of its functions. He shall appoint and may remove all employees in the department . . . in accordance with the provisions of chapter thirty-one.

In my opinion, this statute includes authority to set personnel policies by rule, including a policy to govern Department employees' activities in seeking and holding political office. In drafting a rule on this subject, I suggest that you draw it narrowly to protect your employees' freedom of association and guarantee their right to equal protection of the laws. Two recent Supreme Judicial Court cases have dealt specifically with this matter: *O'Hara v. Commissioner of Public Safety,* Mass. Adv. Sh. (1975) 990; and *Boston Police Patrolmen's Association, Inc. v. Boston,* Mass. Adv. Sh. (1975) 979. In the latter case, which concerned a Boston policeman who became a candidate for the office of City Councillor, the court referred with approval to Rule 34, §4(f) of the Police Department of the City of Boston, which states:

> Every member of the police department, upon becoming a candidate for election to any office under the federal, state or city government, shall take a leave of absence without pay effective with the day he requests nomination papers or subscribes his statement of candidacy and continuing until whichever of the following first occurs: the election or his failure of nomination at the primary or preliminary election or his failure to become, or withdrawal as, a candidate for nomination.

The court held that the above rule is consistent with both Massachusetts law and applicable constitutional provisions. *Id.* at 986-88.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 11. November 12, 1976

Dr. William E. Perrault
Executive Director
Massachusetts State Lottery Commission
15 Rockdale Street
Braintree, Massachusetts 02184

Dear Dr. Perrault:

You have requested my opinion regarding the following question: Does Section 38 of Chapter 10 of the General Laws require that an organization have been in existence as a "[fraternal] organization organized under the provisions of Chapter 180" for five years prior to its application for a Beano license, or is it enough that the organization be organized under Chapter 180 at the time the license is granted so long as the organization has been in existence for at least five years?

I am of the opinion that as long as a fraternal organization is organized under the provisions of G.L. c. 180 at the time it applies for a beano license and has been in existence for at least five years immediately prior to the date of its application, it may be granted a license under the provision of G.L. c. 10, §38. My reasons are as follows.

G.L. c. 10, §38, describes several types of organizations which can apply for and obtain a license from the State Lottery Commission to conduct the game of beano.[1] All of the organizations are compatible with the purpose of §38, which is to provide "funds to be used exclusively for educational, charitable and religious purposes." See 1973 H. Doc. No. 7156. Specifically, a "fraternal organization organized under the provisions of chapter one hundred and eighty [of the General Laws]," which your question to me concerns, meet this statutory purpose: Chapter 180 governs the incorporation and existence of corporations devoted to charitable and certain other purposes (*see* G.L. c. 180, §§1 et seq.); by requiring that a domestic fraternal organization be organized under its provisions, the Legislature has ensured that any funds provided by beano will be used only for the purposes G.L. c. 10, §38, is intended to advance. *Compare* G.L. c. 180, §4.

[1]G.L. c. 10, §38, reads, in relevant part, as follows:

Any fraternal organization having chapters or branches in at least one other New England state, or any fraternal organization organized under the provisions of chapter one hundred and eighty, any religious organization under the control of or affiliated with an established church of the Commonwealth and any veterans' organization incorporated or chartered by the Congress of the United States or listed in clause (12) of section five of chapter forty, any volunteer, non-profit fire company or similar organization furnishing public fire protection, any voluntary association for promotion of the interests of retarded children, the Boston Firemen's Relief Fund, any volunteer, non-profit organization furnishing a public ambulance service, and non-profit athletic associations, desiring to operate or conduct the game commonly called beano, or substantially the same game under another name, in connection with which prizes are offered to be won by chance, may upon application to the state lottery commission be granted a license to conduct said game in a city or town which has voted to allow granting of licenses for the operation, holding or conducting of said game therein; provided, that the application of such organization is in the case of a city, other than the city of Boston, approved by the majority of the city council and approved by the mayor, in a town by the board of selectmen, and in the city of Boston by the licensing board for said city; and provided further, that such organization has been in existence for at least five years immediately prior to the date of making application for such license.

By its direct terms, the statutory language "any fraternal organization organized under the provisions of chapter one hundred and eighty," appears to demand only that such an organization be incorporated under that chapter at the time it applies for a beano license; the language does not look to the status of the organization in the past. There is however, a proviso at the end of the first paragraph of §38 which requires all of the organizations referred to previously in that section to have "been in existence for at least five years prior to the date of making application for [a beano] license." It is the relationship of this provision to the earlier statutory description of a fraternal organization that forms the basis of your opinion request.

The proviso must be read as a limitation or restriction on the right of the several specific types of organizations mentioned in §38 to apply for and receive beano licenses.[2] *See, e.g., Sears* v. *Child,* 309 Mass. 337, 345-346, (1941); *Attorney General* v. *City of Methuen,* 236 Mass. 564, 573 (1921). However, it is a cardinal rule of statutory interpretation that " 'where a provision general in its language and objects, is followed by a proviso . . . the proviso is to be strictly construed, as taking no case out of the provision that does not fall within the terms of the proviso, the latter being understood as carving out of the provision only specified exception, within the words as well as within the reason of the former.' " *Opinion of the Justices,* 254 Mass. 617, 620 (1926) (quoting from Endlich, Interpretation of Statutes, page 742).

Strictly construing the proviso at the end of the first paragraph of §38, I have concluded that this clause does not prohibit a fraternal organization organized under the provisions of G.L. c. 180 for less than five years from receiving a beano license as long as it has had a bona fide existence in some other form of organization for the five years immediately preceding its license application. The five year "existence" requirement of the proviso appears to represent a legislative effort to insure that an organization not be created for the sole and immediate object of holding beano games. Such a purpose would not be further aided, however, by requiring in addition that the organization be organized under G.L. c. 180, for five years. Indeed, such a construction of the proviso would be contrary to the stated purpose of §38 as a whole to "provide *forthwith* funds to be used exclusively for educational, charitable and religious purposes" (emphasis supplied). 1973 H. Doc. No. 7156, *supra.* A construction of statute that is contrary to its stated intent should not be adopted. *See, e.g., Commonwealth* v. *Lamb,* 365 Mass. 265 (1974).

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[2]See also the penultimate clause of §38, first paragraph, which sets forth another qualification on an organization's ability to obtain a beano license.

Number 12. December 10, 1976

Honorable Robert Wood, President
University of Massachusetts
One Washington Mall
Boston, Massachusetts 02108

Dear President Wood:

You have requested my opinion on the applicability of the Massachusetts open meeting law, G.L. c. 30A, §§11A and 11B, to the University of Massachusetts' Board of Trustees. Specifically, you ask about the relationship between the open meeting law and the provisions of G.L. c. 75, §§1 and 3, defining the range of authority of the Board. Your question is:

> Does the Board of Trustees of the University of Massachusetts have the autonomous authority under Mass. G.L. c. 75 to conduct meetings as it may deem necessary, notwithstanding the provisions of Mass. G.L. c. 30A, §§11A and 11B, as most recently amended by St. 1975, c. 303, §1?[1]

Until recently, the Board of Trustees had no rule which specifically defined or even considered the circumstances in which closed meetings — i.e., executive sessions — should be held. Without such a rule, your request for an opinion required a determination whether the autonomy granted the Board of Trustees under G.L. c. 75 was so extensive and unequivocal as to pre-empt the application to it of general mandates such as the open meeting law even though the Board had not explicitly adopted a conflicting policy. On October 6, 1976, however, the Board of Trustees did adopt a rule concerning executive sessions.[2] This rule relates closely to the substance of your original question and will of necessity shape my

[1] As a result of the 1975 amendment you cite, there are presently two sections of G.L. c. 30A denoted as §11B. I will here refer only to the §11B inserted by the 1975 statute and amended again recently by St. 1976, c. 397, §§2-3.

[2] *Executive Sessions.* By vote of a majority of the trustees present at any meeting, the Board may enter into executive session, closed to the public.

Executive sessions may be held only for the following purposes.

(1) to discuss the reputation and character, physical condition or mental health as well as the professional competence of an individual;

(2) to consider the discipline or dismissal of, or to hear complaints or charges brought against an individual;

(3) to discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the university;

(4) to discuss the deployment of security personnel or devices;

(5) to consider allegations of criminal misconduct;

(6) to consider the purchase, exchange, lease or value of property or contracts if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation;

(7) to comply with the provisions of any general or specific law or federal grant-in-aid requirements;

(8) to consider the award of honorary degrees and other awards;

(9) to consider the hiring or promotion of personnel;

(10) to consider matters the disclosure of which might significantly frustrate the implementation of a proposed university action.

The vote shall be taken by roll call and the purpose of the session shall be announced in advance.

response. In the present circumstances, I view your question as narrowed[3] to a consideration whether the rule, adopted under the authority of G.L. c. 75, §3 may stand. For the reasons set forth in my analysis below, I conclude that it may.

It is plain that the terms of the open meeting law, if considered in isolation, are applicable to the University of Massachusetts. General Laws, c. 30A, §11B mandates that "all meetings of a *governmental body* shall be open to the public . . . except as otherwise provided by this section" (emphasis added). While no decisions in Massachusetts have addressed the question, the Board of Trustees clearly appears to be covered by that part of §11A which defines "governmental body" as "a state board . . . within the executive or legislative branch of the commonwealth. . . ." The first sentence of the University's governing statute G.L. c. 75, §1, states:

> There shall be a University of Massachusetts which shall continue as a state institution *within the department of education* but not under its control and shall be governed solely by the board of trustees under section twenty of chapter fifteen (emphasis added).

Because the Department of Education is part of the Executive branch, G.L. c. 6A, §14, the Board of Trustees comes within that Branch as well, and is therefore a "governmental body" within the definition of the open meeting law.[4]

Thus, absent a specific statutory exemption, meetings of the trustees would be subject to the requirements of the open meeting law. The open meeting law itself suggests no such specific exemption. The strongest argument that such an exemption exists lies within the language of G.L. c. 75, §3, which reads in pertinent part as follows:

> *Notwithstanding any other provision of law to the contrary,* except as herein provided, the trustees may adopt, amend, or repeal such rules or regulations . . . for the regulation of their own body, as they may deem necessary . . . (emphasis added).

The underscored language appears categorically to permit disregard of the open meeting law and to give the Board of Trustees free reign over the conduct of its meetings. Thus, by itself, section 3 would appear dispositive of the question you pose.[5] While I ultimately conclude that §3

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[3]For an analysis of the difference between the broad question of pre-emption by legislative intent, raised by your original request, and the narrower question of actual conflict between a statute and a rule, now in issue, *see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-152 (1963).

[4]This conclusion is buttressed by a recent decision of the Supreme Judicial Court treating a question of tort law. In *Hannigan v. The New Gamma-Delta Chapter of Kappa Sigma Frat. Inc.* Mass. Adv. Sh. (1975) 1416, 1417, 327 N.E. 2d 882, 883, the Court applied the doctrine of sovereign immunity to bar a tort action against the U. Mass. Board of Trustees. The Court held *inter alia* that "the trustees are one and the same party, namely the Commonwealth of Massachusetts, since the action was not instituted against the trustees individually, but rather against the board as a statutory entity" (citing G.L. c. 20, §15, and G.L. c. 75, §1). *See also* 1965-1966 Op. Atty. Gen. (July 19, 1965), which concluded that the Board of Trustees fell within the coverage of the open meeting law, as then written. (This opinion is discussed below.)

[5]The word "notwithstanding" when used in a similar manner in other statutes, has been given a rigid interpretation by other state courts. *See, e.g., Dover v. Dover,* 15 C.A. 2d 675, 93 Cal. Reptr. 384, 385 (1971), *State v. Superior Court of L.A. County,* 252 C.A. 2d 637, 60 Cal. Reptr. 653, 654 (1967) *Cf. Board of Ed. of Maple Heights City School Dist. v. Maple Heights Teachers Ass'n.,* 41 Ohio Misc. 27, 322 N.E. 2d 154, 157 (1973). However, there are no Massachusetts decisions interpreting this phrase.

does permit the Board's new rule to stand, a number of factors suggest that the reach of the statute's exempting language is not free from doubt. These factors thereby serve to define the parameters of §3 and must be considered.

First, I note that pertinent legislative history does not support the notion that §3 provides the trustees with a blanket exemption from otherwise applicable general laws. Chapter 75, §3 was enacted as part of a comprehensive revision of the statutes governing the University, recommended by special commission appointed by the Legislature in May, 1961.[6] The Commission's primary effort was to provide the University with fiscal autonomy from executive agencies. *See* Report of the Commission, January 24, 1962, House Doc. No. 3350, particularly pp. 32-33. The Commission spent little time in its report discussing the regulatory powers of the Trustees over their own body. In its sole reference to this issue, the Commission wrote:

> The present authority of the Trustees to make rules and regulations is *adequate* but a revision is recommended so as to place this authority in one unified section of the General Laws. Commission Report at 34 (emphasis added).

The regulatory power that the Commission in 1962 deemed "adequate" included no exempting language whatsoever. Indeed, the pertinent statute read, prior to the Commission's proposed revision:

> The Trustees shall make reasonable rules and by-laws *consistent with law,* with reasonable penalties, for the government of the University and for the regulation of their own body. G.L. c. 75, §10 (1958 ed.) enacted by St. 1863, c. 220, §2, amended by St. 1947, c. 344, §16 (emphasis added).

This statute prior to 1962 thus required that Trustee rules be consistent with other laws. This being the case, it is at best unclear that the Legislature in 1962, in adopting an extensive statute dealing primarily with fiscal autonomy and guided by the Commission Report, intended to provide the Trustees with a blanket exemption from all general laws.[7]

A further basis for suggesting that the exempting language of G.L. c. 75, §3 may be subject to some limitation is the structure of §3 itself.[8] Rather

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[6]The Special Commission on Budgetary Powers of the University of Massachusetts and Certain Related Matters, established by St. 1961, c. 92.

[7]I am mindful of various rules of statutory construction relating to the appropriate use of legislative history. Principally, a statute must be interpreted according to the intent of the Legislature as ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the main purpose of it may be affectuated. *Board of Education v. Assessor of Worcester,* Mass. Adv. Sh. (1975) 2626, 2629. *Industrial Finance Corp. v. State Tax Commission,* Mass. Adv. Sh. (1975) 967, 972. In this case, in an effort to ascertain the fair implications of G.L. c. 75, §3, I have considered the statutes in question "not in isolation but in relation to each other and to other statutes, resorting to their origins, their historic development, and their present language." *Pereira v. New England LNG Co. Inc.* 364 Mass. 109, 115 (1973).

[8]It should also be noted that a prior Opinion of the Attorney General, 1965-1966 Op. Atty. Gen. (July 19, 1965), *supra,* concluded that "the trustees of the University are required by c. 30A, §11A to hold meetings which are public in nature." It is true that this opinion did not address the specific question whether G.L. c. 75, §3 constituted an exemption from the open meeting law. However, the General Court did not see fit, after the issuance of the opinion, to alter the conclusion reached by the Attorney General. In its 1975 and 1976 amendments to c. 30A, §§11A and 11B (St. 1975, c. 303, §1 and St. 1976, c. 397, §§1-3) the General Court left the opinion undisturbed. While the Legislature's failure to amend the statute in light of the Attorney General's opinion does not rise to the level of ratification, the Legislature's apparent tolerance of the conclusion reached by the opinion is entitled to some weight. *Cf. Forcier v. Hopkins,* 329 Mass. 668, 671, (1953) (Legislature presumed to be aware of pertinent judicial decisions).

than providing the Board of Trustees with an absolute exemption from the application of general laws in the conduct of its affairs, the section speaks only to the power of the Trustees to adopt, amend, or repeal rules or regulations for the regulation of their own body "notwithstanding any other provision of law to the contrary." Thus, the exemption appears to confer broad authority on the Trustees in the adoption of rules, but by necessary implication to limit their conduct in the absence of duly adopted rules.

In this manner the statute implies that when the Trustees have deliberated over a particular policy for the regulation of their own body, have reached a collective decision and have promulgated a rule pursuant to the procedure set forth in §3,[9] that policy decision should take precedence over other general laws to the contrary. When, however, no such deliberative process has been followed, the applicable provisions of general laws should prevail. Such a reading (a) permits the specific statute governing the Trustees' powers (G.L. c. 75, §3) to be read in greatest possible harmony with applicable general laws.[10] (b) avoids the extreme result of permitting a single statutory phrase to suspend *ex proprio vigore* the operation of all general laws potentially applicable to the Board's regulation of its affairs, and (c) insures that, if the provisions of general laws are given way to specific measures to the contrary,[11] it will be in circumstances where the Trustees have focused on the very policy question raised in the general law and have acted not on an *ad hoc* basis but rather in prospective, general terms appropriate to the importance ascribed to the issue by the Legislature.

Thus, the proper response to your broad question would raise a troublesome issue absent a specific Board regulation on open meetings. The issue, however, is narrowed and simplified by promulgation of the October 6, 1976 rule. *See* n. 2, *supra.* As stated above, the question now is whether this regulation may stand.

This question is not answered by prior opinions. In 1965-1966 Op. Atty. Gen. (July 19, 1965), *supra,* the Attorney General did conclude that the open meeting law applied to the Board of Trustees, but in a situation where no specific rule pursuant to G.L. c. 75, §3 had been promulgated. Further, in 1975-1976 Op. Atty. Gen. (Jan. 9, 1975) *supra,* the Attorney General determined that c. 75, §3 exempted the Trustees from the rulemaking procedures of c. 30A, §§2-9. However, in that instance the procedures of c. 30A conflicted directly with contrary procedures provided by the explicit terms of §3. See n. 9, *supra.*[12] The situation here is thus a novel one.

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[9]The procedures mandated by c. 75, §3 provide:
"The trustees shall publish such rules and regulations and shall file copies thereof with the governor, the commission on administration and finance, and the joint committees on ways and means." The controlling effect of these procedures despite conflicting rulemaking procedures in G.L. c. 30A, §§2-9 is discussed in 1974-1975 Op. Atty. Gen. (January 9, 1975). *See* p. 9 *infra.*

[10]*See Board of Education v. Assessor of Worcester, supra,* Mass. Adv. Sh. (1975) at 2629.

[11]*Pereira v. New England LNG Co. Inc.* 364 Mass. 109, 118 (1973).

[12]*See also* 1967-1968 Op. Atty. Gen., (November 13, 1967) where language in G.L. c. 75A, §7 applicable to the University of Lowell Board of Trustees and parallel to G.L. c. 75, §3 was determined to preclude application of the general quorum requirements of G.L. c. 4, §6, paragraph 5. In that situation, notably, the Trustees had actually adopted its own quorum by-law. That opinion therefore is in harmony with the conclusions reached here.

However, the language and structure of G.L. c. 75, §3 does provide the answer to your question. The statute plainly provides that once its conditions have been fulfilled through the promulgation of or rule by the Board of Trustees, then "notwithstanding any law to the contrary" the regulation governing the operation of the Board's own affairs must prevail. This interpretation gives meaning to all the language in §3. *See Commonwealth v. Woods Hole, Martha's and Nantucket S.S. Authority,* 352 Mass. 617, 618 (1967). Moreover, it gives due recognition to the principle that when, as here, every effort has been made to avoid a construction that places two statutes in conflict, *see Brooks v. Fitchburg & Leominster St. R'y,* 200 Mass. 8, 17 (1908), and a conflict remains, the general statute must yield to the provision of the specific statute. *Pereira v. New England LNG Co., Inc. supra.* General Laws, c. 75, §3 unquestionably constitutes the kind of specific statute to which the general mandate of the open meeting law must yield once the conditions of c. 75, §3 have been fulfilled.[13]

In summary, I conclude that the broad question posed by your original request concerning the general authority of the Trustees to conduct meetings has been superseded by the promulgation of a comprehensive rule limiting the use of executive sessions. It is my opinion that this rule is valid.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 13. December 21, 1976

Thaddeus Buczko
State Auditor
State House
Boston, Massachusetts 02133

Dear Mr. Buczko:

The Commissioner of Public Welfare and the Commissioner of Education has requested the state auditor to audit grants and contracts from the Departments of Public Welfare and Education to the Elma Lewis School of Fine Arts (ELSFA) for fiscal year 1976. In entering into these grants and contracts, the ELSFA, a non-profit corporation, agreed in writing to permit audits of its use of the funds, and has co-operated with the state auditor in the auditing procedure that is the subject of your opinion request.

[13] A recent holding of the Supreme Judicial Court, *City of Boston v. Massachusetts Port Authority,* 364 Mass. 639 (1974), while distinguishable from this situation, is nonetheless instructive in suggesting limits on the exempting language of c. 75, §3. There, the Court held that air pollution regulations promulgated by the State Department of Public Health were binding on the Port Authority, despite language in its statutory charter, St. 1965, c. 465, §2, providing a broad exemption from "supervision or regulation of... any department, commission, board, bureau or agency of the commonwealth..." The Authority suggested, *inter alia,* that the basis for the §2 exemption was to permit it to operate essentially as a private business rather than a state agency. Accordingly, the Court reasoned that since air pollution regulations applied to all entities, public *and* private, there was not basis for applying the exemption in that instance. The Court then stated that to conclude otherwise would mean "that no legislation authorizing state regulation of any activity or subject, regardless of the breadth of its language and the generality of its application, would supersede such exemption except by express reference to and amendment of the enabling act . . ." 364 Mass. at 655.

Thus, if the general statute involved were applicable to private as well as governmental bodies, as was the case in *City of Boston v. M.P.A.,* more serious doubt as to the applicability of the c. 75, §3 exemption would be raised.

You have asked my opinion as to:

(1) Whether the state auditor may audit these grants and contracts to the Elma Lewis School, a non-profit corporation?

(2) What scope such an audit may take?

At least under the narrow circumstances existing here — i.e., a specific agreement by the organization being audited, permitting the audit to take place, and with the cooperation and acquiescence of ELSFA in the performance of the audit by the state auditor, and finally the initiation of the audit process not by independent assertion of authority by the auditor but at the request of grant-making state agencies — it is my opinion that the state auditor may audit certain grants to the Elma Lewis School .The scope of such an audit should be limited to those processes necessary to determine the proper receipt and use of Commonwealth grant monies.

The primary statutory authority governing the activities of the state auditor is G.L. c. 11, §12, which provides in pertinent part as follows:

> The department of the state auditor shall make an audit as often as the state auditor determines it necessary, but in no event less than once in every two years of the accounts of all departments, offices, commissions, institutions, and activities of the commonwealth, including those of districts and authorities created by the general court.

In the case of *Auditor v. Trustees of the Boston Elevated Railway Company,* 312 Mass. 74 (1942), the Supreme Judicial Court held that, under §12, the auditor could not independently audit the accounts of a private corporation, against the will of that corporation. See also, 1930-31 Op. A.G. 94. Despite the prohibition on such private audits, *Boston Elevated* does not apply to the circumstances here. The relevant differences are as follows.

First, unlike the situation in *Boston Elevated* where the auditor asserted independent power to compel the audit there in question, the auditor is acting here at the explicit request of state agencies whose power to audit grants to the school is clear. The Department of Public Welfare provided funds to the ELSFA under a contract. The contract provided for the purchase of after-school day care services from the ELSFA. Part 6(c) of this contract provides:

> All financial, program, and other books, records, documents and property relevant to this agreement shall at all reasonable times and in accordance with clause 8 be open for inspection, review, or audit by the Department or its authorized representatives.

Thus, the contract specifically gives audit authority to representatives of the Department of Public Welfare.

Similarly, the Department of Education made three grants to the ELSFA. Two of these grants were made under the provisions of the Vocational Education Act; the third grant was made for Magnet Education programs. The agreement signed by the ELSFA with the State Department of Education which governs the Vocational Education Act grants provides:

> I do hereby certify compliance with the above assurances and, further agree that funds will be used as stipulated in the application, and that supporting documents for expenditures will be submitted for audit.

The grant for Magnet Educational programs was made under Section 8 of Chapter 636 of the Acts of 1974. Regulations under this statute state:

> The Board [of Education] reserves the right to audit the expenditure of all payments of funds made according to these regulations.

The Boston School Department applied for this grant for services it stated would be provided by ELSFA, and certified in its application that the regulations governing expenditures of the funds would be observed. Thus, in each instance, audit of the use of these grants by the state has been specifically agreed to by the school.

The second distinction lies in the acquiescence of the ELSFA. It has not objected to the conduct of the audit by the state auditor. On the contrary, it has cooperated fully with the auditor. Any objections the School might have to the request by the state agencies that the state audior be utilized have been waived by the school's voluntary participation in the audit. Cf. *Kimball v. First Baptist Society in Amesbury,* 68 Mass. 517 (1854); see also *Duckworth v. Diggles,* 139 Mass. 51 (1885); *Fox v. Hazelton,* 27 Mass. 275 (1830).

Given these factors, the narrow inquiry in this opinion is whether the state auditor may properly accept the request of the state agencies to perform this voluntary audit.[1] The use of the state auditor by the Departments of Public Welfare and Education to perform these audits is a logical and efficient method of fulfilling the statutory duty of these two agencies to oversee the proper disposition of funds they have granted.[2] The performance of audits is, after all, the state auditor's constitutional and statutory function as a state officer. E.g., G.L. c. 11, §1, et seq.; c. 29, §2C; St. 1976 c. 502. His expertise should be available for such situations unless there exist specific prohibitions on such activities. See *United States v. Freeman,* 44 U.S. 556 (1845); *Multi-Line Ins. Rating Bureau v. Commissioner of Insurance,* 357 Mass. 19 (1970); Sutherland, *Statutory Construction,* §65.03 and cases cited therein.[3] In light of the conclusion reached here, it is unnecessary to reach the more difficult question of the auditor's independent authority in §12 or elsewhere to compel an audit of these grants.[4]

[1]Thus, this opinion does not treat situations involving the appropriateness of an independent audit against the will of a private corporation.

[2]The legitimacy of the auditor's role in performing a service to state agencies has been recognized. *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority,* 352 Mass. 617, 619 (1967).

[3]This conclusion is not inconsistent with *Boston Elevated, supra,* since that case involved an interpretation of c. 11, §12 in the context of independent action by the auditor, resisted by the audited party. The auditor's proper role must be interpreted in the context of the particular situation and in light of the objects of the entire applicable legislative scheme. The scope of the auditor's independent authority need not be read to limit his range of permissible activity as a designee in a voluntary situation. See *Bristol County v. Secretary of the Commonwealth,* 324 Mass. 403 (1949) *Universal Machine Co. v. Alcoholic Beverages Control Commission,* 301 Mass. 40 (1938). Thus this opinion in no way questions or qualifies the conclusions reached in other cases or opinions of the Attorney General.

[4]It should be noted that an amendment to c. 11, §12 after the *Boston Elevated* decision specifically authorizes the auditor to examine the books of vendors to the Department of Public Welfare in the course of auditing the Department of Public Welfare. ELSFA is such a vendor. Moreover, G.L. c. 29, §2C authorizes the auditor to audit the expenditure of all federal grants.

Turning to the permissible scope of the audit of ELSFA, such questions ıve been addressed in several opinions of the Attorney General. The ermissible scope includes the examination of those documents necessary verify amounts received and to check disbursements against them. E.g., 945-46 Op. A.G. 95; 1942-44 Op. A.G. 28, 29; 1935-36 Op. A.G. 107; 930-31 Op. A.G. 94. Accordingly, you may in this instance audit the ccounts of the ELSFA at least to the extent necessary to determine the ceipt and disbursements of funds under the applicable grants and ontracts.

In summary, you may accept the requests of the Department of Public elfare and the Department of Education to audit grants to the Elma ewis School on their behalf, where there has been no objection by the chool to such an audit. The audit may include examination of those ccounts necessary to determine the receipt and expenditure of grant funds.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

umber 14. December 22, 1976

ames S. Cooper, Chairman
abor Relations Commission
00 Cambridge Street
oston, MA 02202

ear Commissioner Cooper:

You have requested my opinion regarding the following question:

> Upon reaching the mandatory retirement age of seventy specified in §3(2) (g) of Chapter 32 of the General Laws is Commissioner Madeline H. Miceli required to retire or may she serve out the remainder of her term which expires on August 25, 1978?

is my opinion that Commissioner Miceli must retire upon attaining the aximum age of employment for the group in which she is classified.

Several provisions of Chapter 32 state that members of the Retirement ystem must retire upon reaching mandatory retirement age. Section 3(2) f Chapter 32 provides:

> (e) *No member* and no person who was ineligible for membership because of entering or reentering the service after attaining age sixty, except as otherwise provided for in subdivision (1) of section five or in section ninety-one, or in section twenty-six of chapter six hundred and seventy of the acts of nineteen hundred and forty-one, or in chapter sixteen of the acts of nineteen hundred and forty-two as amended, *shall remain in service after attaining the maximum age for his group* or for the group in which he would have been classified had he become a member or after the date any retirement allowance becomes effective for him, whichever event first occurs.

G.L. c. 32 §20 (5) (e) provides in part:

> It shall be the duty of such board to notify each such member or employee . . . of the date when such member or employee *will attain the maximum age for his group,* and such member or employee *shall not be employed in any governmental unit after such date* except as otherwise provided for in sections one to twenty-eight, inclusive.

G.L. c. 32 §1 provides in part:

> "Maximum Age", the age on the last day of the month in which any member classified in Group I as provided for in paragraph (g) of subdivision (2) of section three attains age seventy, or if classified in Group 2 or Group 4 attains age sixty-five, or if classified in Group 3 attains age fifty-five.
> Amended by St. 1967, c. 826, §1.

G.L. c. 32 §3 (2) (g) provides in part:

> Group I. — Officials and general employees including clerical, administrative and technical workers, laborers, mechanics and all others not otherwise classified.

Commissioner Miceli was first appointed as a Labor Relations Commissioner in 1965 while employed in State service in a different capacity and while an active member of the Retirement System. Her membership in the State Retirement System has continued until the present time.

The fact that Commissioner Miceli reached age seventy on September 9, 1976 does not change her status as a member; nor would any waiver of her pension pursuant to G.L. c. 32 §90B change that status. Section 3(1)(c) of Chapter 32 provides in part that "[a] member shall retain his membership in the System so long as he is living and entitled to any present or *potential benefit* therein." (Emphasis added.) Thus, having been an active member in service of the Retirement System upon reaching age seventy and being entitled to a pension upon retirement, it is impossible for Commissioner Miceli to shed the status of "member" in order to avoid the statutory requirements that accompany this status. The case of *Williams* v. *Contributory Retirement Appeal Board,* 304 Mass. 601, 608 (1939) supports this position in holding that an elected official who chose to become a member of a county retirement system "was not at liberty to withdraw from membership as he was about to reach the time fixed for retirement, and thereafter continue to serve for the remainder of the term for which he had been elected."

Just as Commissioner Miceli can take no steps to withdraw as a member of the Retirement System upon reaching age seventy in order to finish the remainder of her term, she cannot continue her employment by waiving her pension or retirement allowance pursuant to §90B of Chapter 32. The waiver language of §90B, even as broadly construed by a 1972 Attorney General Opinion, only permits a retired employee to waive his pension and thereby render himself eligible for re-employment by the Commonwealth

up to, but not beyond, the mandatory retirement age. 1972 Op. Atty. Gen. No. 71/72-15 (January 10, 1972). Because §90B focuses on return to active service from "premature retirement," it has no application to the situation of Commissioner Miceli who has reached the age of mandatory retirement during the course of her unexpired term with the Labor Relations Board.

Commissioner Miceli thus falls squarely within the above-cited provisions for mandatory retirement upon reaching the maximum age specified for her employment group. She does not qualify for any of the statutory exceptions to mandatory retirement listed in §3(2) (e) of Chapter 32. In this regard, her status as an appointed official must be contrasted to the status of elected officials who are specifically exempted from the requirement of mandatory retirement upon reaching maximum age. G.L. c. 32 §5(1) (d) provides:

> Notwithstanding any provision of this chapter to the contrary, any member holding office by popular election at the time of attaining maximum age for his group, whether or not he is then entitled to a superannuation allowance, may continue to serve in such office until the expiration of any succeeding term or terms for which he may subsequently be re-elected thereto and during such term or terms he shall not be subjected to compulsory retirement but shall continue as an active member of the Retirement System and deductions shall be made from his regular compensation so long as he holds such office and the time of holding such office shall be considered creditable service for the computation of his retirement allowance.

No such broad exception to the requirement of mandatory retirement upon reaching maximum age applies in the case of appointed officials.

Commissioner Miceli's situation is similar to the facts of a 1961 Attorney General Opinion. That opinion concluded that the Executive Director of the Chicopee Housing Authority, who was a member of the Retirement System and who wanted to forego his retirement allowance upon attaining age seventy in order to remain in his position, had to retire. 1961 Op. Atty. Gen. No. 105 (November 10, 1961). That Opinion referred to G.L. c. 32 §§3(2) (e) and 20(5) (e) as authority for the position that retirement was mandatory. In like manner Commissioner Miceli, as a member of the Retirement System who does not fall within an exception to the mandatory retirement provisions of G.L. c. 32 §§3(2) (e) and 20(5) (e), must terminate her employment with the State prior to the expiration of the term to which she was appointed.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 15. December 28, 1976

Wallace C. Mills
Clerk of the House
State House
Boston, Massachusetts 02133

Dear Mr. Mills:

You have forwarded to me an order of the House of Representatives which seeks my opinion on the following question:

> Does section fifty-four A of chapter seventy-one of the General Laws require school committees to have a person as defined in said section in personal attendance at every interscholastic football game played by any teams representing a public secondary school?

The legislative history of this statute indicates that it does not require such personal attendance at interscholastic football games.

General Laws, c. 71, §54A, as amended by St. 1975, c. 569 provides, in pertinent part, as follows:

> A physician employed by a school committee or a person who has completed a full course in emergency medical care as provided in section six of chapter one hundred and eleven *shall be assigned* to every interscholastic football game played by any team representing a public secondary school in the commonwealth . . . (emphasis supplied).

In 1972, the legislation which was to become G.L. c. 71, §54A was initially introduced in the legislature as House Bill 2270. The original language of House Bill 2270 provided that "[a] physician employed by a school committee *shall be in attendance* at every interscholastic game." 1972 House Doc. No. 2270. (Emphasis supplied.) However, the language of the original bill was changed in committee and when House 2270 was subsequently enacted as St. 1972, c. 74, the language "in attendance" was deleted and the word "assigned" was substituted in its place.

In 1975, the legislature amended G.L. c. 71, §54A to expand the class of medically trained persons qualified to be assigned to interscholastic football games. St. 1975, c. 569. At that time, legislation was again introduced which would have required that physicians actually "be present" at such games. 1975 House Doc. No. 4394. However, the General Court, in amending G.L. c. 71, §54A chose instead to enact 1975 House Doc. No. 6534 which retained the "shall be assigned" language intact.

The legislature is presumed to understand and intend all consequences of its own measures. *Spaulding* v. *McConnell,* 307 Mass. 144, 149 (1940). Moreover, in construing a statute, "reason and common sense are not to be abandoned in the interpretative process . . ." *Van Dresser* v. *Firlings* 305 Mass. 51, 53, (1940). Here, had the legislature desired to require personal attendance of medical personnel at interscholastic football games, it could have adopted the language which was proposed and rejected in

1972 and again in 1975.[1] The legislature's rejection of language requiring personal attendance compels the conclusion that medical personnel must be assigned and available, but need not be in actual attendance at secondary school interscholastic football games.[2]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 16. January 18, 1977

James W. Callanan
Executive Secretary
Board of Retirement
One Ashburton Place
Boston, Massachusetts

Dear Mr. Callanan:

You have requested my opinion on behalf of the Board of Retirement as to the appropriate disposition of conflicting claims under chapter 32 of the General Laws. Specifically, you have informed me that a state employee was criminally indicted in the United States District Court for the District of Massachusetts. In accordance with G.L. c. 30, §59, the employee was suspended without pay pending the completion of the criminal proceedings. At the trial, the jury returned a guilty verdict with respect to most of the charges against the employee at which time the employee fatally shot himself in the courtroom. The employee's death occurred prior to the entry of judgment of conviction by the court. See F. R. Crim. P. 32(b) (1). Subsequently, the presiding judge allowed a motion to dismiss the case against the employee as moot.

Based on the above stated facts, you have asked whether the deceased employee was eligible for retirement benefis.[1] It is my opinion that the employee was not eligible for retirement benefits at the time of his death for the following reasons. General Laws c. 30, §59 provides in pertinent part as follows:

> An officer or employee of the commonwealth, or of any department, board, commission, or agency thereof . . . may, during any period such officer or employee is under indictment for misconduct in such office or employment, . . . be suspended by [the appointing authority], whether or not such appointment was subject to approval in any manner . . .

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[1] I have been informed that subsequent to the enactment of St. 1972, c. 74, it had been the practice of most school committees to have a physician on call — not in attendance. Moreover, I have been informed that the legislature was aware of this practice. Thus, its failure to substitute the words "in attendance" for the word "assigned", in light of this knowledge, bolsters the conclusion that it did not intend to require personal attendance.

[2] I do not decide what sorts of arrangements between school committees and medical personnel satisfy the requirement that such personnel be assigned to such games. Of course, school committees may choose to have physicians or medically trained personnel in attendance at such games as a means of complying with G.L. c. 71, §54A, but such attendance is a matter for school committee judgment rather than statutory mandate.

[1] The significance of this determination is as follows. If the employee was eligible for retirement benefits, those benefits would be payable to his surviving spouse under G.L. c. 32, §12(2) (d). However, if he was ineligible for retirement benefits, his named beneficiaries — here, his children — are entitled to receive a refund of the employee's actual contributions to the retirement system. See G.L. c. 32, §11.

Section 59 further provides:

> Any person so suspended shall not receive any compensation or salary during the period of such suspension, . . . *nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law,* but all contributions paid by him into a retirement fund, if any, shall be returned to him.
> If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, . . .

At the time of the employee's death, the jury had returned a guilty verdict. Section 59 provides for removal of the suspension only after a termination of the criminal proceedings without a finding or verdict of guilty. See generally 1966 Op. A.G. p. 67. Accordingly, at the time of his death, the employee was still suspended from his position under Section 59 because the criminal proceedings had not ". . . terminated without a finding or verdict of guilty . . . ." G.L. c. 30, §59.

General Laws, c. 30, §59 does not specifically provide for the disposition of retirement funds in this particular factual situation. However, in interpreting statutes, the statute, if reasonably possible, must be construed to carry out the legislative intent. *Industrial Finance Corp.* v. *State Tax Commission,* Mass. Adv. Sh. (1975) 967; *Commissioner of Corporations & Taxation* v. *Board of Assessors of Boston* 324 Mass. 32 (1949). One clear purpose of Section 59 is to insure that a person found guilty of misconduct in the performance of his official duties, does not participate in benefits normally afforded state employees who have successfully completed a career in state government. See 1966 Op. A.G. p. 55.

Here, at the time of his death, the employee had been found guilty by the jury and was awaiting the formal entry of a judgment of conviction and the passing of sentence. See F. R. Crim. P. 32(b) (1). The terms "judgment" and "sentence" are ordinarily synonymous. Either term denotes the action of a court in a criminal case formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted. Hunter, FEDERAL TRIAL HANDBOOK §91.1 (ed. 1974). Cf. *Morris* v. *United States,* 156 F.2d 525 (9th Cir. 1946). Thus, at the time of the employee's death, a legal decision had been rendered by a jury that the employee was guilty of most of the criminal charges against him.

In the situation that you have described, the proceedings terminated with a finding of guilty followed by a dismissal for reasons of mootness because of the employee's intervening death. The clear purpose of Section 59 would not be served if that statute were interpreted as requiring the payment of survivor benefits to the spouse of an employee who has been found guilty of criminal conduct simply because a formal entry of judgment had not occurred. Such a result would negate a specific intent of a portion of G.L. c. 30, §59 that employees whose employment terminates

while under suspension or who are found guilty of acts which constitute misconduct in office are not entitled to receive retirement benefits. See *Bessette* v. *The Commissioner of Public Works,* 348 Mass. 605, 610 (1965). See also G.L. c. 32, §10(2) (c).

Accordingly, it is my opinion that at the time of his death the employee was not eligible for retirement benefits but could receive only a refund of his actual contributions to the retirement system. See G.L. c. 32, §11.[2]

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 17. January 27, 1977

John R. Buckley
Secretary of Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Buckley:

You have requested my opinion concerning the following question:

> May the Commissioner of the Department of Corporations and Taxation designate a person pursuant to Chapter 14, Section 1 temporarily to fill a vacancy in the position of Director of Accounts resulting from the retirement of the Director?

The recent retirement of the Director of Accounts occasions your request. General Laws c. 14, §1 provides in relevant part:

> The commissioner may designate a competent employee in the bureau of accounts to perform the duties of the director of accounts in case of his absence, death, or disability; and notes of counties, towns and districts, when certified by such employee, shall have the same validity as if certified by the director.

It is my opinion that this statute grants to the Commissioner authority to designate an employee in the bureau of accounts to act as director on a temporary basis pending the selection and appointment of a new director where retirement has caused a vacancy in that position.

"[D]eath" and "disability" are relatively specific circumstances under which the temporary designation of a director is allowed. In order to supplement them, however, the legislature has seen fit to add a general category of "absence." The term "absence," unlike "death" or "disability," does not suggest a particular cause of or length of time for nonperformance.[1] Had the legislature contemplated a narrowly defined set of circumstances under which designations were to be allowed, it would have avoided the term "absence" altogether or else modified the term to indicate

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[2]As a consequence of this opinion, it follows that the employee's spouse is not entitled to a survivor's allowance under G.L. c. 32, §12(2) (d), and his children are entitled to share equally in the refund of his actual contributions to the system.

[1]In this sense the flexibility of the term is even greater than "vacancy," which generally describes a permanent inability to act. *See* Op. Atty. Gen. No. 75/76-73 (June 11, 1975).

that only certain types of absences would qualify. *Compare* G.L. c. 11, §2; c. 10, §5.[2]

Further support for a broad construction of the term "absence" in G.L. c. 14, §1 is derived from the emergency preamble to the Act inserting that section in the General Laws, St. 1954, c. 429. The preamble defines the purpose of the Act as "provid[ing] for uninterrupted service in the Bureau of Accounts." This indication of legislative intent is consistent with a liberal construction of the term "absence" in the statute, as only an expansive reading of the term would allow for a temporary designation in every situation where it became necessary to maintain uninterrupted service by the Bureau. A statute should be construed to effectuate an express legislative purpose. *Board of Education* v. *Assessor of Worcester,* 1975 Mass. Adv. Sh. 2626, 2629-2630, 333 N.E. 2d 450, 452-453 (1975).

General Laws c. 14, §1 aside, the broad administrative powers vested in the Commissioner under G.L. c. 14, §3 would seem to include the authority temporarily to designate an acting director of accounts upon retirement of the permanent director.

The first paragraph of §3 provides:

> The commissioner shall be responsible for administering and enforcing all laws which the department is or shall be required to administer and enforce. He shall be the executive and administrative head of the department and each division, bureau, section and district office thereof shall be under his direction, control and supervision.

The section then goes on to grant the Commissioner extensive authority over the organization of the Department and the appointment, assignment and transfer of its employees. It is my opinion that the Commissioner's supervisory authority and responsibilities as defined by §3 are broad enough to authorize the designation of a temporary director of the bureau of accounts prior to the appointment of a permanent director upon the previous director's retirement. When there is insufficient time to appoint a permanent director, for example, such a designation would be necessary in order to ensure that the duties of the bureau's director continue to be executed.[3]

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[2]These provisions. also relating to "absences" of persons filling positions in the Commonwealth, explicitly characterize the absences as temporary or else treat them as one of a broader class of disabilities.

G.L. c. 11, §2 provides in part:

> If, by reason of sickness, *absence* or other cause, the auditor is *temporarily* unable to perform the duties of his office, the first deputy shall perform the same until such disability ceases.

G.L. c. 10, §5 provides in part:

> During the illness, *absence or other disability* of the treasurer, his official duties shall be performed by the said deputies in the order of seniority.

In contrast, the use of the term "absence" in G.L. c. 14, §1 is neither specifically limited to temporary situations nor made a sub-category under the umbrella of disabilities. Rather, it is a separate category co-equal to "death" and "disability." Where an alleged inconsistency exists among statutes it is a familiar rule of construction that they be interpreted to give a reasonable effect to all. *Everett* v. *Revere,* 344 Mass. 585, 589, 183 N.E. 2d 716, 719 (1962). A broad reading of "absence" as used in G.L. c. 14, §1 would accomplish this objective.

[3]An opinion of a prior Attorney General, 1963-64 Op. Atty. Gen. No. 98 (August 28, 1964) [sic]. supports the conclusion I have reached here. That opinion recognized the authority of the Commissioner of Corporations and Taxation to make a temporary appointment of a chief of a bureau when the former holder of the position took a leave of absence — despite the lack of specific statutory foundation for its exercise.

In sum, I am of the opinion that under the specific and general powers delegated to the Commissioner by G.L. c. 14, §§1 and 3, respectively, the Commissioner may designate or appoint an employee of the bureau of accounts to fill the position of director pending the selection, appointment and approval of a permanent director when the previous occupant of that position has retired. Accordingly, I also conclude that pursuant to the last clause of c. 14, §1, the notes of counties, towns and districts certified by such a designee will possess the same validity as those certified by a permanent director. I wish to emphasize, however, the temporary nature of this designation. The Commissioner should make every effort to appoint and seek approval of a permanent director as soon as possible in order to comply with the statute's requirement that there is to be a permanent director of accounts.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 18. January 28, 1977

Speaker of the House of Representatives
Clerk of the House of Representatives
State House
Boston, Massachusetts 02133

Dear Speaker McGee and Clerk:

On August 25, 1976, the House of Representatives issued House Order No. 5323 requesting the Attorney General to render an opinion relative to "the constitutionality of the establishment by the Department of Public Works of a diamond lane, so called, restricting the use of inside lanes of the Southeast Expressway to cars having four or more passengers." It is my opinion that such action would be constitutional.

The establishment of a diamond lane by the Department of Public Works, as regulation of highway use, is a permitted exercise of the state's police power. It has long been recognized that the police power of a state encompasses a broad authority to regulate the use of its highways. *See e.g., Neu v. McCarthy,* 309 Mass. 17, 19 (1941), where the court stated:

> The State, as the original and general sovereign, establishes and maintains the public ways and regulates their use . . . . [G]eneral control remains in the State and may be exercised by it to secure safe and orderly use of the ways for the benefit of all persons and agencies . . . .

Accord, Opinion of the Justices, 297 Mass. 559, 563 (1937). *See Bibb v. Navajo Freight Lines,* 359 U.S. 520, 523 (1969). *Cf. Boston v. McCarthy,* 304 Mass. 18, 20-21 (1939) (regulatory power over sidewalks and public ways).

In view of this expansive regulatory authority over highway use, it is clear that the Commonwealth (or its agent, the Department of Public Works) may reasonably determine that the establishment of a diamond

lane would promote the public safety and convenience. Restriction of an inside lane of the highway to cars of four or more passengers may accomplish one or more of the following permissible legislative ends: provide an incentive for car pooling because of speedier access to, and egress from, the city of Boston; reduce the number of cars using the Southeast Expressway thereby effecting a more orderly flow of traffic; reduce accidents; lower air pollution; conserve fuel; reduce maintenance costs. The only remaining question is whether there exist "any countravailing interest[s] of constitutional dimensions", *Neu v. McCarthy, supra* at 19, which might nevertheless render establishment of such a lane unconstitutional.

I have concluded that there are no such interests. Clearly the presence of a diamond lane does not unreasonably interfere with a citizen's right to travel. *Cf. Shapiro v. Thompson,* 394 U.S. 618, 629-631, (1969). It is also plain that the lane would not violate equal protection rights. In view of the many reasons (some of which are cited above) that can be given in support of the lane's establishment, regulation providing for the lane does not discriminate arbitrarily against any class of drivers or travelers. Nor could a diamond lane be considered an undue burden on interstate commerce. As the Supreme Court of the United States has stated:

> The power of the State to regulate its highways is broad and pervasive. We have recognized the perculiarly local nature of this subject of safety, and have upheld state statutes applicable alike to interstate and intrastate commerce. *Bibb v. Navajo Freight Lines, supra* at 523.

No other constitutional rights or interests appear pertinent to the establishment of a diamond lane.

In summary, it is my opinion that establishment of a diamond lane represents a constitutional and valid exercise of the Commonwealth's police power to regulate the use of its highways.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 19. February 1, 1977

The Honorable Michael S. Dukakis
Governor
State House
Boston, Massachusetts 02133

Dear Governor Dukakis:

You have requested my opinion whether Commonwealth employees who are in the National Guard are entitled to receive state pay as well as federal pay for days they perform certain military duty. Specifically, you have asked the following question:

> In view of the provisions of G.L. c. 33, §59A, enacted subsequently to c. 33, §59, and of c. 33, §83(d), are (i) full-time officers, and (ii) non-commissioned officers and non-military division state employees entitled to receive state pay for days for which they receive so-called FTTD pay from the United States for military duty?

It is my opinion that non-commissioned officers and non-military division state employees and the Adjutant General, but not other full-time state staff officers, may receive regular state pay for days for which they receive FTTD pay.

To maintain their readiness, units and individual members of the National Guard participate, upon orders of the Governor transmitted by the Adjutant General, in full-time training duty (hereafter FTTD), including encampments, maneuvers, outdoor target practice, or other exercises for field instruction. FTTD also includes attendance at Army, Air Force or National Guard schools, participation in small arms competitions, attendance at service schools, and attachment to corresponding service branches, 32 U.S.C.A. §§503, 504, 505.[1]

These training duty activities are performed not only by enlisted personnel and non-commissioned officers, but also by state staff officers in the Military Division of the Executive Branch of the Commonwealth. The latter participate in these activities in addition to their regular staff responsibilities.[2] All National Guard personnel, regardless of rank, receive military pay directly from the United States for participation in these types of full-time training duty, as provided by 37 U.S.C.A. §204(a),[3] even though the duty is performed while in state rather than federal status.[4]

I will first answer your question regarding enlisted personnel and non-commissioned officers, and then regarding full-time officers.

A. Enlisted personnel and non-commissioned officers

State employees and officials are entitled to receive their regular civilian pay from the Commonwealth while performing certain types of duty in the Guard, pursuant to G.L. c. 33, §59. This statute provides, in pertinent part, as follows:

> Any person in the service of the commonwealth . . . shall be entitled, during the time of his service in the armed forces of the

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[1]See also, National Guard Regulation 350-1, ch. 1, §1-5(i) which defines FTTD as follows:

> i. Full-time training duty. Full-time training or duty, with or without pay, authorized for members of the Army National Guard under title 32 U.S.C. Sections 316 and 502-505. This duty is performed in State status (as opposed to federalized or State active duty status) and includes, but is not limited to, AT [annual training], attendance at Army service schools, Army area schools, participation in small arms competition, attendance at military conferences, short tours for special projects, special tours in the National Guard Bureau, ferrying of aircraft, and participation in exercises or other similar duty.

[2]See G.L. c. 33, §15 (composition, powers and duties, and compensation of state staff).

[3]37 U.S.C.A. §204(a) provides as follows, in pertinent part:

> (a) . . . [T]he following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title . . .
>
> (2) . . . a member of the National Guard who is not a Reserve of the Army or the Air Force, who is participating in full-time training, training duty with pay, or other full-time duty, provided by law, including participation in exercises or the performance of duty under section 3033, 3496, 3451, 8033, 8496, or 8541 of title 10, or section 503, 504, 505, or 506 of title 32.

[4]See National Guard Regulation 350-1, ch. 1, §1-5(i), *supra.*, p. 2, fn. 1. See also, *Lind* v. *Nebraska National Guard*, 144 Neb. 122, 12 N.W. 2d 652, 655 (1944).

> commonwealth, under section thirty-eight;[5] . . . to receive pay therefor, without loss of his ordinary remuneration as an employee or official of the commonwealth . . . and shall also be entitled to the same leaves of absence or vacation with pay given to other like employees or officials.

The "armed forces of the Commonwealth" referred to in §59 consist of the active and inactive units of the National Guard, G.L. c. 33, §10. Because FTTD is duty ordered by the Governor, "service in the armed forces of the Commonwealth" under §38 includes FTTD. Therefore, insofar as a Commonwealth employee or official serving as an enlisted person or noncommissioned officer is performing FTTD service pursuant to §38, G.L. c. 33, §59 mandates that there be no reduction in his or her state pay.[6] Thus, the employee must receive FTTD pay in addition to regular state pay.

G.L. c. 33, §59A,[7] to which you refer in your question, is not relevant to the present issue. This statute expressly applies only to "assigned weekly or weekend drills," which are not full-time training duty. 37 U.S.C.A. §204(a). Compare 32 U.S.C.A. §§503-505 with 32 U.S.C.A. §502(a).

B. The State Staff

State staff officers in the Guard also may be ordered to participate in FTTD by the Governor. Whether or not they are entitled to receive their regular state pay as military officers for periods of FTTD is a question of statutory right, rather than common law rules.[8]

Officers of the state staff, except for the Adjutant General, are entitled to receive their respective salaries "[e]xcept when ordered on duty under section thirty-eight." G.L. c. 33, §15 (j). FTTD is duty under §38. (See p. 4, *supra.*) State pay for FTTD, as §38 duty, must be made under G.L. c. 33, §83(a).[9] However, this pay is to be reduced by the amount of pay received from the federal government for the same service, pursuant to G.L. c. 33, §83(d), which provides as follows:

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[5]G.L. c. 33, §38, provides as follows:
The commander in chief may order out any part of the organized militia for escort and *other duties* including special duty and emergency assistance to state and local civil authorities in the preservation of life and property. G.L. c. 33, §38. (Emphasis supplied.)

The Governor is the Commander-in-Chief. Mass. Const. Pt. 2, c. 2, §1, Art. 7. The armed forces of the Commonwealth, *i.e.,* the National Guard, are part of the organized militia. G.L. c. 33, §4.

[6]Numerous Opinions of my predecessors have applied the protective provisions of §59 to Commonwealth employees and officials for performance of military service. See, 1962 A.G. Op. 41; 1956 A.G. Op. 62; 1951 A.G. Op. 14; 1941 A.G. Op. 18; 1940 A.G. Op. 105; 1940 A.G. Op. 33; and 1939 A.G. Op. 124. In the absence of the provisions of §59, a state employee would not be entitled to compensation for times when he or she was absent from work. 1939 A.G. Op. 124.

[7]G.L. c. 33, §59A, provides as follows, in pertinent part:
Any person in the service of the commonwealth . . . shall be entitled during the time of his service in the armed forces of the commonwealth . . . to be released from his work, without compensation, in order to attend assigned weekly and weekend drills which require absence from his normally scheduled work tour. Such release from work shall not affect his leaves of absence or vacation with pay, and he shall receive the same leaves of absence or vacation with pay given to other like employees or officials. (Emphasis supplied.)

[8]"A soldier's entitlement to pay is dependent upon statutory right," rather than upon common-law rules governing private contracts. *Bell* v. *United States,* 366 U.S. 399, 401 (1961).

[9]G.L. c. 33, §83(a) provides as follows:
For duty performed under the provisions of sections thirty-eight, sixty and sixty-one there shall be allowed and paid from funds appropriated therefor to members of the armed forces of the commonwealth the same rate of pay of like grade as would be received by them if they were on an active duty status in the armed forces of the United States with less than two years' service, and such subsistence, travel or other allowance as the adjutant general may authorize.

> For duty performed under the provisions of [section] thirty-eight . . . the pay and allowances authorized by this section shall be reduced by any amounts received from the United States government as pay or allowances for military service performed during the same pay period.

Therefore, an officer of the state staff, except for the Adjutant General, may receive only the excess, if any, of his §83(a) pay over federal FTTD pay for time spent performing full-time training duty.

In addition, analysis of the language of G.L. c. 33, §59, (quoted at p. 4, *supra*) reveals its inapplicability to full-time Guard officers in the state staff, including the Adjutant General. The statute provides entitlement to state pay to "[a]ny person in the service of the commonwealth . . . *during the time of his service in the armed forces of the commonwealth.*" (Emphasis supplied.) Since state staff members are always serving "in the armed forces of the commonwealth," that phrase if applied to state staff would lose its meaning and become mere surplusage. This would contravene the established rule of statutory construction that in construing a statute, all of its terms must be given meaning and effect. *Town Crier, Inc.* v. *Town of Weston,* 361 Mass. 682 (1972); *Commonwealth* v. *Mercy Hospital,* Adv. Sh. (1974) 43.

Similarly, the purpose of G.L. c. 33, §59, is not consistent with its applicability to full-time military employees of the Commonwealth. The purpose of the statute is to protect state employees from suffering loss of pay or rights to leaves and vacation on account of service in the Guard, so as not to discourage membership in the Guard by state employees. Because state staff members must be officers of the Guard to be eligible for initial appointment to a position in the state staff,[10] the purpose of §59 shows it to be irrelevant and inapplicable to full-time Guard officers on the state staff. In two earlier Opinions, the statutory phrase "in the service of the Commonwealth" was expressly found to mean "in the civilian service of the Commonwealth". 1940 A.G. Op. 33; 1939 A.G. Op. 124.

The Adjutant General, who is the executive and administrative head of the Military Division of the Executive Branch of the Commonwealth, receives state pay at the same level as a corresponding officer in the regular military service of the United States. G.L. c. 33, §15(b). There is no statutory provision prohibiting the Adjutant General from receiving his regular state pay for duty under §38,[11] or reducing his regular pay by the amount of federal pay received for participation in §38 duty.[12]

C. Conclusion

For the reasons stated above, it is therefore my opinion (a) that commonwealth employees and officials who are enlisted personnel or noncommissioned officers are entitled to receive their regular state pay for the same time period for which they receive FTTD pay from the United States; (b) that state staff officers are entitled to receive state pay for

[10]G.L. c. 33, §15(a).

[11]*Cf.* G.L. c. 33, §15(j) (compensation of state staff officers aside from Adjutant General).

[12]*Cf.* G.L. c. 33. §83(d), which provides for such a reduction from pay received under §83.

full-time training or duty only to the extent such state pay exceeds the amount of FTTD pay they receive from the United States; and (c) that the Adjutant General is entitled to receive his regular state pay for the same time period for which he receives FTTD pay from the United States.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 20. February 14, 1977

Alexander E. Sharp, II, Commissioner
Department of Public Welfare
600 Washington Street
Boston, Massachusetts 02111

Dear Commissioner Sharp:

You have asked my opinion on the following question:

> In view of the decisions of Judge Walter Skinner of the United States District Court of December 9 and December 21, 1976, and January 3, 1977, in *Ingerson* v. *Sharp* (CA 76-3255-S), is the Commonwealth required to withdraw from the Emergency Assistance Program under 42 U.S.C. §606(e)?

For the reasons set forth below, I conclude that the court decisions to which you refer do not compel you to withdraw from the Emergency Assistance Program.

The *Ingerson* litigation, initiated in September, 1976, was a class action challenging two restrictions on the availability of benefits under the Massachusetts Emergency Assistance Program. The plaintiffs in *Ingerson* claimed that the two restrictions, described below, conflicted with Section 406(e) of the Social Security Act, 42 U.S.C. §606(e), and were therefore invalid under the Supremacy Clause[1] of the United States Constitution, Article VI, cl. 2.[2]

The Emergency Assistance Program (hereafter EA) is one part of the statutory Social Security System; it is designed to alleviate the condition of needy children through a cooperative state-federal system. Under this system, the federal government reimburses fifty percent of a state's expenditures to those who qualify for assistance. As with all the benefit programs created by the Social Security Act, participation by a state in the EA Program is voluntary. However, the federal government will reimburse the state only if its program satisfies federal requirements.

The federal EA Program authorizes the state to render emergency financial aid to a household with one or more needy children under 21, living with certain relatives specified in the Act, 42 U.S.C. §606(a), if the

[1]The Supremacy Clause, in pertinent part, dictates that "This Constitution and the Laws of the United States . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

[2]The plaintiffs also claimed that the restriction violated the Equal Protection Clause of the Fourteenth Amendment. The district court did not reach these claims, and they do not bear on the question raised in your opinion request.

household is without available resources, and the assistance is necessary to avoid destitution or loss of shelter. Massachusetts has participated in the EA Program since 1968. The Massachusetts plan provides for payments to meet a variety of emergencies, including threat of eviction on account of rent arrearages, and cutoffs of fuel and utility for nonpayment of overdue bills.

The EA Program was limited recently by the two restrictions which the plaintiffs in *Ingerson* challenged. The first restriction, imposed by regulation, limits payments for shelter, fuel and utility arrearages to no more than the "amount . . . incurred within the 4 months prior to the date of application for payment under the EA program." Massachusetts Public Assistance Policy Manual, ch. IV, §A, pt. 4(C) & (D). The second restriction was created, not by regulation, but by state statute, G.L. c. 118, §2, ¶4. It reads as follows:[3]

> No payment of overdue rent or utility bills shall be made under this chapter to a person who has received assistance [e.g. Aid to Families with Dependent Children or General Relief] and who has failed to pay such rent or utility bills when due.

Judge Skinner found that both restrictions were invalid, because, in his view, they placed limits on EA eligibility inconsistent with the intent of the federal statute creating the EA Program, and therefore violated the Supremacy Clause.[4] *Ingerson v. Sharp,* decision of December 9, 1976, p. 8. Accordingly, on December 21, 1976, Judge Skinner ordered that:

> So long as Massachusetts continues to participate in the joint federal-state Emergency Assistance Program, the defendants are hereby permanently enjoined from applying [the two restrictions].

You question whether Massachusetts is required to withdraw from the federal program on account of this decision. Your concern arises from at least two factors which are common to Supremacy Clause cases alleging state law conflict with a provision of the Social Security Act. First, the federal program which created the conflict between state and federal law is a voluntary one; Massachusetts has the option of withdrawing from it at any time. Second, if Massachusetts were to withdraw from the federal EA Program, thereby foregoing federal reimbursement, there would no longer exist a conflict between state and federal law, because the federal law would no longer apply in Massachusetts. Massachusetts could therefore continue to operate a wholly state-funded EA Program, with the restrictions intact. The question then is whether you are required to withdraw from the federal program in order to permit the state statute to continue to operate.[5] Recognizing that legislative mandates are absolutely binding

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[3]This statutory provision was engrafted onto G.L. c. 118, §2 by Stat. 1975, c. 684, §25A 1/2.

[4]For a general treatment of the application of the Supremacy Clause to invalidate state laws conflicting with federal statutes, *see Florida Lime Avocado Growers v. Paul,* 373 U.S. 132 (1963). A court's finding of conflict forces the invalidation of state law regardless whether the federal statute is directly binding on all states or, as here, optional with each state. *See Townsend v. Swank,* 404 U.S. 282, 285 (1971).

[5]Obviously, no problem of this sort arises from the court's invalidation of the Department of Public Welfare's regulation. The Department, having promulgated the regulation, is free to repeal it wtihout running afoul of state law. G.L. c. 30A, §3.

on public officials, you seek to know what that mandate is, under c. 118, §2, or other relevant law, now that the federal district court has found the state and federal statutes in conflict.

The answer to your question turns on an interpretation of legislative purpose: Can the Legislature be viewed as intending, when it enacted the limitations in G.L. c. 118, §2, ¶4, that federal reimbursement under the EA Program was to be sacrificed in order that these limitations be preserved. Only if such an intent can be inferred would you be required to withdraw from the federal program. No canon of statutory construction gives credence to such an inference. Indeed, unless the Legislature speaks specifically to the issue, there would be no basis for concluding that, in passing a statute, it was contemplating the steps that should be taken upon a finding of the law's invalidity.[6]

Accordingly, it is my judgment, after a careful review of all relevant material, that no intent to mandate withdrawal from the EA Program can fairly be inferred from the language of paragraph 4 or the provisions of any other state statute. To the contrary, other relevant statutes make plain that the overriding mandate from the Legislature is to obtain federal financial participation under the Social Security Act, and the Commissioner is to use his efforts to further this goal. For example, G.L. c. 118, §5 mandates that:

> The department shall, in addition to its annual report, make such reports to the Secretary of Health, Education and Welfare under the Federal Social Security Act, as amended, as may be necessary to secure to the commonwealth the benefits of said act.

With equal emphasis the General Court, in G.L. c. 18, §10, has instructed the Department of Public Welfare to:

> take such action as may be necessary or desirable for carrying out its programs and purposes in conformity with all requirements governing federal aid to the commonwealth.

Moreover, the Supreme Judicial Court has held that the state and federal statutory schemes governing aid to families with dependent children are designed to be "harmonious." *Carroll v. Acting Director of Public Welfare of Cambridge,* 355 Mass. 182, 187 (1969). Notably, G.L. c. 118, §2 is a cornerstone of the state scheme referred to by the *Carroll* court.

In my judgment therefore, the Legislature did not intend, in enacting C. 118, §2, ¶4, that Massachusetts withdraw from the EA part of the Social Security Act in order to avoid the effect of a federal court finding

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[6]Two other principles of construction have no bearing on your question. One principle prefers an interpretation of a statute, if fairly possible, that avoids a finding of unconstitutionality. *See, e.g., Baird v. Bellotti,* Mass. Adv. Sh. (1977) 96, 99. That doctrine does not reach the question of what inferences about legislative intent are appropriate once a finding of unconstitutionality has already been made. The second principle of construction concerns the separability of unconstitutional sections of a state statute from other sections, so as to preserve the validity of the remainder of the law. *See generally* Sutherland, Statutory Construction. §§44.01 *et seq.* (4th ed. 1973). As an illustration, the court in *Ingerson* properly separated the invalid clause, G.L. c. 118, §2, cl. 4, preserving the validity of the remainder of §2.

of invalidity.[7] Accordingly, you are not required to withdraw from the Emergency Assistance Program.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 21. March 4, 1977

John R. Buckley, Secretary
Executive Office for
Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Buckley:

You have requested my opinion as to whether the proposed Westover Occupational Resource Collaborative Trust would be an instrumentality of the Commonwealth so that it could qualify to receive surplus real property from the United States for use as an occupational education facility. "[T]he States and their political subdivisions and instrumentalities" may be grantees of surplus real property for educational purposes under federal law.[1]

Specifically, you have requested an answer to the following question, based upon state, not federal, law:[2]

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[7]Note should be taken that because the federal district court has enjoined you from applying G.L. c. 118, §2, ¶4, so long as participation in the federal EA Program continues, you are not subject to liability under G.L. c. 29, §66, which imposes criminal sanctions upon officers who violate any provision of state law relating to the expenditure of public funds. Prosecution in a state court under §66, given the federal court order, would itself constitute a violation of the Supremacy Clause, Article VI, cl. 2, of the United States Constitution. *See Ingerson,* decision of December 21, 1976, pp. 2-3.

[1]See 40 U.S.C. §484 (k) (1), which provides in pertinent part as follows:

(k) (1) Under such regulations as he may prescribe, the Administrator [of General Services] is authorized, in his discretion, to assign to the Secretary of Health, Education, and Welfare for disposal such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Secretary of Health, Education, and Welfare as being needed for school, classroom, or other educational use, or for use in the protection of public health, including research.

(A) Subject to the disapproval of the Administrator within thirty days after notice to him by the Secretary of Health, Education, and Welfare of a proposed transfer of property for school, classroom, or other educational use, *the Secretary of Health, Education, and Welfare* through such officers or employees of the Department of Health, Education, and Welfare as he may designate, *may sell or lease such real property,* including buildings, fixtures, and equipment situated thereon, *for educational purposes to the States and their political subdivisions* and *instrumentalities* and tax-supported educational institutions which have been held exempt from taxation under section 101(6) of Title 26 . . . (Emphasis added.)

[2]It should be noted that the determination of whether an entity is a political subdivision or instrumentality of a state, as those terms are used in a federal statute, is governed by federal, not state law. Accord, *National Labor Relations Board* v. *Natural Gas Utility District,* 402 U.S. 600, 602-603 (1970); *Popkin* v. *N.Y. State Health and Mental Hygiene Facilities and Improvement Corp.,* 409 F. Supp. 430, 431 (S.D. N.Y. 1976); *First State Bank of Gainesville* v. *Thomas,* 38 F. Supp. 849, 851 (N.D. Tex. 1941); see, *Boston Elevated Ry. Co.* v. *Welch,* 25 F. Supp. 809, 810 (D. Mass. 1939); cf. *United States* v. *Brown,* 384 F. Supp. 1151, 1159-1160 (E.D. Mich. 1974). But see *Mallory* v. *White,* 8 Supp. 989, 992 (D. Mass. 1934). "In the absence of a plain indication to the contrary . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *Jerome* v. *United States,* 318 U.S. 101, 104 (1943). However, because my opinion concerning the status of the proposed trust under state law is apparently necessary to an application for acquisition of the property to the Department of Health, Education, and Welfare, I will answer your request. My conclusion would be the same if based upon federal law. *See First State Bank of Gainesville* v. *Thomas, supra,* 851; *Boston Elevated Ry. Co.* v. *Welch,* supra, 810-811; *cf. Essex Public Road Board* v. *Skinkle.* 140 U.S. 334, 339 (1890).

> Is the Westover Resource Cooperative Trust (sic) as described in the proposed trust agreement . . . a "political subdivision and instrumentality" under the laws of the Commonwealth of Massachusetts?

See also, 45 C.F.R. §§12.1 — 12.14.

It is my opinion that the proposed trust is a governmental instrumentality under state law.

Ten towns and two regional school districts in Hampden and Hampshire counties have entered into a collaborative agreement, pursuant to G.L. c. 40, §4E,[3] to conduct a joint educational program to be known as the Westover Occupational Resource Collaborative (hereafter "WORC"). WORC is attempting to acquire surplus real estate of the United States at the deactivated Westover Air Force Base, Chicopee, as a facility for its program.

The proposed Westover Occupational Resource Collaborative Trust (hereafter "WORC Trust"), by the terms of the trust instrument, "is established . . . to provide a convenient instrumentality of the Commonwealth of Massachusetts to receive and to manage surplus real estate at Westover Air Force Base, Chicopee, Massachusetts . . . for the benefit of cities, towns and regional school districts joining together under a collaborative agreement to jointly conduct educational programs and services pursuant to Chapter 40, Section 4E, of the Massachusetts General Laws. . . ." The beneficiaries of the trust are to be the cities, towns and regional school districts which are participating in the collaborative agreement. The trust property is to be held "for the benefit of the beneficiaries for use in connection with the collaborative."

The trust agreement further provides that each participating school committee shall select from its membership one trustee to serve on the board of trustees and shall appoint successor trustees from its membership. Any trustee may be removed at will by the school committee that appointed him or her, and is disqualified from serving as a trustee upon termination of membership on such school committee. The trust instrument may be amended, and the trust itself terminated, only with the approval of the school committees representing a majority of the beneficiaries. Upon termination, the proceeds of the trust property after liquidation are to be distributed equally among its then beneficiaries.

It is well settled that cities and towns are political subdivisions and instrumentalities of the Commonwealth, *Burnham* v. *Mayor and Alderman of Beverly,* 309 Mass. 388, 389 (1941), as are regional school districts, see *Regional District School Committee of Bridgewater Raynham Regional School District* v. *Town of Bridgewater,* 347 Mass. 289, 294 (1964). No Massachusetts court has determined whether a trust such as the proposed WORC Trust, created for the benefit of these local entities and with

[3]G.L. c. 40, §4E, authorizes school commitees to conduct joint educational programs and services to supplement or strengthen school programs and services, in cooperation with the Commonwealth's Department of Education and with funds managed by an educational collaborative board.

trustees appointed by them, would constitute a "political subdivision or instrumentality" of the Commonwealth.[3]

However, the Supreme Judicial Court has described certain identifying features of an "instrumentality of government" of the Commonwealth. Such an entity must be within or attached to the government; its members must be public officers, subject to removal by, and under the direction of, government officials; and its subordinate employees must be treated as state employees subject to civil service law and rules. *Opinion of the Justices,* 309 Mass. 571, 578-582 (1941); *Opinion of the Justices,* 271 Mass. 582, 592-594; see also, *Norton* v. *Attorney General,* 269 Mass. 503, 509-510, 512 (1929).[4]

Considering the WORC Trust in light of those principles, I conclude that the Trust qualifies as an instrumentality of government. The purpose of the WORC Trust is to acquire and manage facilities in which the joint occupational education programs of the participating municipalities will be conducted; it thus serves a public purpose. The trustees, as members of the participating school committees, are public officers. *Sweeney* v. *City of Boston,* 309 Mass. 106, 108 (1941); *Warburton* v. *City of Quincy,* 309 Mass. 111, 114 (1941). Each trustee may be removed by his or her respective school committee, and may not serve as trustee beyond his or her tenure on such committee. The trust instrument may be amended, and the trust terminated, only by action of a majority of the participating school committees. Accordingly, I find that the WORC Trust is sufficiently within the control of, and attached to, the participating local governmental entities to satisfy the requirements discussed above at p. 5, for being an instrumentality of government.[5]

Therefore, it is my opinion that under the laws of the Commonwealth the proposed WORC Trust would be an instrumentality of government of the Commonwealth.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[3]Decisions stating that certain public authorities and corporations are analogous to municipal corporations as "an arm of the State," *e.g. Opinion of the Justices,* 334 Mass. 721, 734-735 (1956) (Massachusetts Port Authority); *Massachusetts Turnpike Authority* v. *Commonwealth,* 347 Mass. 524, 527 (1964) (Massachusetts Turnpike Authority); *Collins* v. *Selectmen of Brookline,* 325 Mass. 562, 564 (housing authority); *Opinion of the Justices,* 334 Mass. 760, 763 (1956) (urban development corporations) are not relevant to the questions here presented, which involves a trust with a single purpose and limited powers.

[4]*Compare Unemployment Compensation Commission* v. *Wachovia Bank & Trust Co.,* 215 N.C. 491, 2 S.E. 2d 592, 595-596 (1939) (factors to be considered in determining whether an agency is or is not an instrumentality of government include (1) whether it was created by government, (2) whether it is wholly owned by the government, (3) whether it is operated for profit, and (4) whether it performs some essential government function).

[5]Because the WORC Trust does not contemplate or provide for the hiring of employees, I need not consider the question whether or not subordinate employees are subject to the civil service laws and rules.

Number 22. March 14, 1977

Frank Grice, Director
Division of Marine Fisheries
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Grice:

You have requested my opinion as to the requirements for the issuance of commercial fisherman permits for the taking of lobsters in coastal waters pursuant to Section 1 of Chapter 484 of the Acts of 1975, as amended by Chapter 729 of the Acts of 1975.

Specifically, you direct my attention to that portion of Section 1 providing for the issuance of additional permits and you ask if the Marine Fisheries Advisory Commission can apply the same criteria — a showing of substantial hardship — to *renewal* permit applicants as it does to new applicants. For the reasons set forth below, I answer your question in the affirmative.

As amended, Section 1 of Chapter 484 now reads:

> "Notwithstanding the provisions of section thirty-eight, the director shall not issue more than thirteen hundred commercial fisherman permits for the taking of lobsters in coastal waters annually. The director may give priority in the issuance of such permits for a new calendar year, consistent with the provisions of this section, to applicants who have held such a permit and fished for lobsters during the preceding year. Subject to the approval of the marine advisory commission, the director may issue up to one hundred and thirty additional permits if the applicant had been issued a commercial fishermen's permit for the taking of lobsters in coastal waters for any year since nineteen hundred and seventy *or* if he finds that the applicant would suffer a substantial hardship if the permit were not granted." (emphasis supplied)

You have informed me that after issuing thirteen hundred permits, the Director held all further applications, including those of individuals who held permits since 1970, for consideration by the Advisory Commission. The commission decided to issue one hundred and thirty additional permits.[1] In doing so, the Commission used the "substantial hardship" criterion to judge all additional applications both renewal and original.

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[1]Although not expressly raised by your request, I note that the Marine Advisory Commission made the decision to issue the additional permits. Chapter 484, Section 1 specifically provides that *"the director may issue* up to one hundred and thirty additional permits" (emphasis supplied), subject to the approval of the commission. It is a familiar principle of statutory construction that express mention of one matter excludes by implication all other similar matters not mentioned. *Bristol County* v. *Secretary of the Commonwealth*, 324 Mass. 403 (1949) and cases cited therein. Where, as in this instance, the statute expressly authorizes the director to issue additional permits and the commission to approve such permits, the commission may not exercise the authority granted to the director by the Legislature. Although the director, as the person to whom the Legislature has itself delegated the particular function of issuing the additional permits, may exercise whatever powers may be reasonably necessary to perform that function, 64-65 Op. Attorney General 134, the decision whether or not to issue the additional permits must be made by the director himself. A re-delegation of his decision-making power is unlawful as an exercise of governmental power without legislative authority. 64-65 Op. Attorney General 229; see also 5 Op. Attorney General 1970, 628; *Attorney General* v. *Trustees of Boston Elevated Railway Co.*, 319 Mass. 642 (1946).

The decision to use this standard was based, in part, on the consideration that renewal applicants had been given a prior opportunity to apply for permits and had not done so. The use of the "substantial hardship" test resulted in the denial of permits to some individuals who had held permits since 1970.

A literal reading of Chapter 484, §1 indicates that there are two separate and independent criteria which the Director, subject to the approval of the commission, may use in judging applications once he has decided to issue the additional one hundred and thirty permits: (1) that the applicant had been issued a permit in any year since 1970, or alternatively (2) that the applicant would suffer a substantial hardship if the permit were not granted. It is significant that the statute specifically inserts the word "or" between these two criteria. Generally the word "or" in a statute is not the equivalent of the word "and"; only when a contrary intent clearly appears from the context of the statute or its legislative history, are the two words interchangeable. *United States* v. *Fisk,* 70 U.S. 445 (1865); *Piet* v. *United States,* 176 F.Supp. 576, 583 (S.D. Cal. 1959); *Eastern Massachusetts St. Ry. Co.* v. *Massachusetts Bay Transportation Co.,* 350 Mass. 340 (1966). *See, generally,* 82 C.J.S. §335. In my opinion the word "or" in Chapter 484, Section 1 indicates an intention to designate alternative or separate categories. Accordingly, where the Director desires to do so, he may employ either criteria as the exclusive criteria to select applicants for additional permits.

For these reasons, I answer your question in the affirmative.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 23. March 15, 1977

Commissioner Marie A. Matava
Commission for the Blind
110 Tremont Street
Boston, Massachusetts 02108

Dear Commissioner Matava:

You have requested my opinion on two matters relating to the scope of authority of the Commission for the Blind. Specifically, you have asked:

> 1. May the Commission fund a state-wide screening program of nursing home residents, sponsored by the Massachusetts Society for the Prevention of Blindness, aimed at the detection of conditions potentially leading to blindness, in order that medical and/or low vision services could be provided? and
>
> 2. May the Commission make recommendations to the Cowan Foundation, a private foundation, concerning the funding of services to the blind?

It is my opinion that both questions should be answered in the affirmative.

First, with respect to the authority of the Commission to fund the proposed screening program, G.L. c. 6, §145(a) defines the role of the Commission to include such activity. In pertinent part, that statute provides:

> The commission shall continuously study problems relating to blindness and make investigations, demonstrations and reports thereon, and shall establish and maintain contact with such physicians and other qualified persons or facilities available to render competent services to the blind. . . .

As described in your letter, the screening program's purpose would appear to be consonant with the mandates of §145(a). Certainly, the detection of conditions leading to potential blindness is within the realm of "problems relating to blindness." In addition, the screening program would appear to come within the usual definition of investigation, i.e., "the process of inquiring into or tracking down through inquiry," *Mason* v. *Peaslee,* 173 Cal. App. 2d 587, 343 P. 2d 805, 808 (Ct. App. 1959). *See also, McGahon* v. *Wagner,* 8 Misc. 2d 337, 170 N.Y.S. 2d 251, 254 (Sup. Ct. 1957) (studies made for the prevention of mental health and the prevention of psychiatric disorders are "investigations.")

Although G.L. c. 6, §145 does not expressly authorize funding for the type of program you describe, the Commission's power to do so derives implicitly from the broad range of duties enumerated in the statute and imposed upon the Commission. In the absence of explicit statutory limitation, the Commission is deemed to have been afforded the incidental authority to employ all ordinary means necessary for the full and efficient exercise of its powers and the satisfactory performance of its duties. *See School Committee of New Bedford* v. *Commissioner of Education,* 349 Mass. 410, 414 (1965); *Bureau of Old Age Assistance of Natick* v. *Commissioner of Public Welfare,* 326 Mass. 121, 124 (1950). It is therefore my opinion that G.L. c. 6, §145 and the Commission's implicit powers derived therefrom, would permit the Commission to fund the Society's proposal.

With respect to your second question, concerning the Cowan Foundation, §130 of G.L. c. 6 appears to grant the Commission the authority to provide the Foundation advice and guidance in its distribution of funds to enhance services to the blind. In part, G.L. c. 6, §130 provides that:

> The commissioner may ameliorate the condition of the blind by devising means to facilitate the circulation of books, by promoting visits among the aged or helpless blind in their homes, by aiding individual blind persons in accordance with sections one hundred and thirty-one to one hundred and thirty-one E, inclusive, *or by other means as he may deem expedient.* . . . (emphasis supplied).

It is apparent that the Commission has been granted broad power under this section; in such circumstance the content of the Commission's regulations on a specific subject takes on added moment. "[The] importance [of agency regulations] is never greater than where . . . an agency must

interpret legislative policy which is only broadly set out in governing statutes." *School Committee of Springfield* v. *Board of Education,* 362 Mass. 417, 442 (1972), *appeal after remand,* 365 Mass. 215 (1974).[1]

In this regard, Regulation 4450, entitled "Community Planning", provides guidance in determining the scope of G.L. c. 6, §130, for purposes of the instant question. That regulation provides, in part:

> The Commission for the Blind will cooperate with and work with local leadership and participate in community planning to promote community action and needed rehabilitative and preventative services in respect to the problems and needs of blind persons . . . Community planning is defined as activities of the staff in providing leadership and/or participating with other community agencies, organizations and interested citizens in the development and/or extension of the broad range of resources and facilities to meet the social and economic needs of the community, especially those of recipients of assistance and other low-income groups . . .

The Commission, in promulgating Regulation 4450, has underscored its own recognition of the statutory obligation to cooperate with other agencies and parties involved in assisting blind persons. The Cowan Foundation is one such agency which plans to distribute funds to provide services to the blind. In so doing it will obviously help extend the "broad range of resources and facilities to meet the . . . economic needs of the community". Regulation 4450.

Thus, it is my opinion that the general authority granted the Commission by G.L. c. 6, §130, as further defined by the Commission's duly-promulgated Regulations gives the Commission authority, when requested, to provide advisory assistance to the Foundation.[2]

Sincerely,
FRANCIS X. BELLOTTI
Attorney General

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[1]See also, *Op. Atty. Gen.*, December 12, 1964, p. 152, at p. 153:
The agency is thus in effect authorized to make the initial interpretations of its statute in light of its expertise in the subject matter . . . Where the Legislature has enacted a statute which contains broad or ambiguous language, such interpretative regulation can be an important contribution by the agency.

[2]Your letter of December 27, 1976 raised an additional question to which I am unable to respond. It concerns a possible conflict of interest, under G.L. c. 268A. Apparently, the money for the screening program would go to an organization, the Massachusetts Society for the Prevention of Blindness, whose Executive Director also serves as a member of your advisory board, G.L. c. 6, §129. Section 10 of c. 268A states that a state employee shall be entitled to an opinion of the Attorney General upon any question arising under the law "relating to the duties, responsibilities and interests of such employee." I am therefore unable to render an opinion unless I receive a request directly from the employee. In any event, the existence of a possible conflict of interest has no bearing on the legality of the programs discussed in the foregoing opinion.

Number 24. March 15, 1977

Mr. John P. Larkin
Executive Secretary
Alcoholic Beverages Control Commission
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Larkin:

You have requested my opinion regarding the proper construction of G.L. c. 138 §25B(c). For reasons more fully articulated below, I believe that an owner of a brand of alcoholic beverage is "unable" to take the action required by the statute when he is unwilling to do so. I therefore conclude that the Alcoholic Beverages Control Commission (Commission) may, in accordance with Section 25B(c) (3), authorize a liquor wholesaler to file a schedule of wholesale prices without first establishing the incapacity of the owner to take such action.

G.L. c. 138 §25B prohibits the sale within the Commonwealth of any brand of alcoholic beverage to wholesalers, unless schedules containing certain information are filed with the Commission. Paragraph (c) of this Section provides as follows:

> (c) The schedule containing the bottle and case price to wholesalers shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the commission, *or* (3) *with the approval of the commission, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.* (emphasis supplied)

Your question specifically concerns the usage of the word "unable" in this context. It requires determining whether an owner must be incapable of filing a schedule of prices (or of designating an agent to do so) before the Commission may allow a wholesaler to file the schedule.

In construing a statute, words are to be interpreted in light of the purpose served by the act. *See, Atlas Distributing Co.* v. *Alcoholic Beverages Control Commission,* 354 Mass. 408, 414 (1968). Every effort must be made to give effect to the perceived legislative purpose, even though this may require that the common or plain meanings of words are to be disregarded in favor of meanings which will accomplish the statutory goal. *United States* v. *American Trucking Association, Inc.,* 310 U.S. 534, 543-544 (1940); *Selectmen of Topsfield* v. *State Racing Commission,* 324 Mass. 309, 314 (1949).

The word "unable", as it is most commonly used, denotes that a person is incapable of performing an act. *See, Webster's Third New International Dictionary,* 2481 (P.B. Cove ed. 1964); *State* v. *Higbee,* 328 Mo. 1066, 43 S.W. 2d 825, 829 (1931). However, if this definition were to be adopted in the instant case, it would be difficult to conceive of a situation

in which the owner of a brand would actually be incapable of filing a schedule of prices in accordance with §25B(c) (1), or of designating an agent to do so in accordance with §25B(c) (2). Such a restrictive definition would deprive §25B(c) (3) of any practical effect. It would thus defeat the apparent legislative intent to provide an alternative way to secure information on wholesale brand prices in the event that the procedures contained in §25B(c) (1) and (2) fail.

I conclude that, in order to effect the statutory purpose of §25B(c) (3), the word "unable" must be interpreted to include the concept of "unwillingness". *Accord, State* v. *City of Seattle,* 66 Wash. 329, 402 P. 2d 486 (1965). I therefore construe this section to authorize the Commission, in its discretion, to allow a wholesaler to file a price schedule whenever the owner of a brand is unwilling to do so.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 25. March 21, 1977

Honorable John R. Buckley
Secretary
Executive Office for Administration and Finance
State House
Boston, Massachusetts 02133

Dear Secretary Buckley:

In letters dated December 21, 1976 and January 19, 1977, you have asked me three questions concerning the interpretation of St. 1976, c. 434. Chapter 434 charges you with establishing a program to ensure that at least five per cent of all goods and services purchased by the Commonwealth are purchased from "small businesses."[1] Your questions are as follows:

(1) Are purchases made by entities such as the University of Massachusetts, the Massachusetts Port Authority, the Massachusetts Turnpike Authority, and the Massachusetts Bay Transportation Authority to be included in the program?

(2) Should administrative expenditures and expenditures for consultant services be included in computing the base from which at least five per cent is to be allocated to small business purchases?

(3) Should expenditures made from trust funds be excluded in computing the above-described base?

[1]A "small business" is defined in St. 1976, c. 434, §2(6) as a business which is independently owned and operated, has its principal place of business within the commonwealth, which is not dominant in its field of operation, and is not a corporation which is a member of an affiliate."

With regard to your first question, St. 1976, c. 484, §3, provides that the small business purchasing program "shall apply to all purchasing agencies." Section 2(4) of St. 1976, c. 484 defines a "purchasing agency" as "any agency, department, board, commission, office or authority of the commonwealth." Thus, if the statutory language is considered solely on its face, each of the entities listed by you would appear to be included within its scope. However, upon more careful consideration, it is my conclusion that only one of such entities, namely the Massachusetts Bay Transportation Authority, constitutes a "purchasing agency" within the meaning of St. 1976, §2(4), and accordingly, only the purchases of that authority are to be included in the small business purchasing program. I shall discuss each entity individually.

General Laws c. 75, §1 provides:

> There shall be a University of Massachusetts which shall continue as a state institution within the department of education but not under its control and shall be governed solely by the board of trustees established under section twenty of chapter fifteen. In addition to the authority, responsibility, powers and duties specifically conferred by this chapter, the board of trustees shall have all authority, responsibility, rights, privileges, powers and duties customarily and traditionally exercised by governing boards of institutions of higher learning. In exercising such authority, responsibility, powers and duties said board shall not in the management of the affairs of the university be subject to, or superseded in any such authority by, any other state board, bureau, department or commission, except as herein provided.

The quoted language plainly accords to the trustees of the University a great deal of autonomy in the management of its affairs. This autonomy is confirmed by the provisions of G.L. c. 75, §3, which state:

> Notwithstanding any other provision of law to the contrary, except as herein provided, the trustees may adopt, amend or repeal such rules and regulations for the government of the university, for the management, control and administration of its affairs, for its faculty, students and employees, and for the regulation of their own body, as they may deem necessary, and may impose reasonable penalties for the violation of such rules and regulations. The trustees shall publish such rules and regulations and shall file copies thereof with the governor, the commissioner of administration and finance, and the joint committee on ways and means.[2]

That the autonomy of the trustees extends not only to matters of a purely academic nature but also to financial matters is plain. General Laws c. 75, §8, provides that the trustees may, at their own discretion, transfer funds among subsidiary budget accounts. Of even greater relevance to the

[2]Recently, I issued an opinion to the effect that, pursuant to the provisions of §3, the trustees may promulgate a regulation exempting themselves from certain of the requirements of G.L. c. 30A, §11B (The Open Meeting Law). *See Op. Att'y. Gen'l.* 1976/77, No. 12.

instant question is G.L. c. 75, §13, which gives the trustees substantial independence in the area of purchasing. Section 13 states:

> Notwithstanding any other provision of law to the contrary, the trustees or officers of the university designated by them shall have the authority to make any purchase or purchases in the amount of five hundred dollars or less, and to purchase without limitation of amount library books and periodicals, educational and scientific supplies and equipment, printing and binding, emergency repairs and replacement parts, and perishable items, without recourse to any other state board, bureau, department or commission; provided, that in so doing the university shall follow modern methods of purchasing and shall, wherever practicable, invite competitive bids. Except as herein provided, the state purchasing agent shall on the certification of availability of funds purchase all items specified on requisitions submitted to him by the university; provided, that the university shall have the right to review all bids received on university requisitions and to make binding recommendation on the award of the contract based on the judgment of the university as to which of the bids best meet the university's specification on which the bids were received.

Thus, the authority of the trustees is, in all significant respects, paramount to that of other state agencies.

The nature of the trustees' authority reflects a recognition on the part of the General Court that an institution of higher learning can thrive only in an atmosphere of complete academic freedom. The extension of that authority into the areas of budget and purchasing reflects a further recognition that, ultimately, academic freedom is intimately related to fiscal independence. *See generally Report of the Special Commission on Budgetary Powers of the University of Massachusetts and Related Matters,* 1962 House Document No. 3350.

It is my opinion that to subject the University of Massachusetts to the small business purchasing program established under St. 1976, c. 484, would interfere with the fiscal autonomy of the University in a way not intended by the General Court. Any external direction concerning the sources from which the University may make its purchases is necessarily a restriction on the trustees' fiscal discretion. This being the case, I must conclude that the University is not a "purchasing agency" as defined in St. 1976, c. 484, and is therefore not subject to the small business purchasing program. *See also Opinion of the Justices,* 363 Mass. 889 (1973) (University of Massachusetts possesses authority to enter into a tenancy of real estate without obtaining approval under G.L. c. 8, §10A, and without regard to restrictions imposed by annual appropriations acts).

Massachusetts Port Authority

The Massachusetts Port Authority is established by the provisions of G.L. c. 91 App., §1-2, which provide in part:

> There is hereby created and placed in the department of public works a body politic and corporate to be known as the Massachusetts Port Authority, which shall not be subject to the supervision or regulation of the department of public works or of any department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function.

By its terms, §1-2 makes the Authority independent of control by other state agencies. Moreover, through the operation of G.L. c. 91 App., §1-8 (authority to issue bonds) and G.L. c. 91 App., §1-14 (power to charge user fees), the Authority is self-supporting. Ultimately, it is intended that the Authority operate essentially as a private business. *See generally Report of the Special Commission on the Massachusetts Port Authority,* 1956 House Document No. 2575.

To subject the Authority to the provisions of St. 1976, c. 484 would conflict with the intent that its operations be independent in character. Just as a private business may purchase from whom it deems desirable, so too, the Authority must be permitted to choose its own suppliers. An alternative result would prevent the members of the Authority from acting solely on the basis of sound business judgment. I therefore conclude that, like the University of Massachusetts, the Massachusetts Port Authority is not a "purchasing agency" within the meaning of St. 1976, c. 484, §2(4), and is therefore not subject to the Commonwealth's small business purchasing program. *Contrast Boston v. Massachusetts Port Authority,* 364 Mass. 639, 649-658 (1974) (Authority is subject to pollution regulations promulgated by Department of Public Health because they are applicable to both state agencies and private businesses).

Massachusetts Turnpike Authority

The enabling legislation of the Massachusetts Turnpike Authority is contained in G.L. c. 81 App. Section 1-3 of that chapter provides, in part:

> There is hereby created and placed in the state department of public works a body politic and corporate to be known as the "Massachusetts Turnpike Authority", which shall not be subject to the supervision and regulation of the department of public works or of any other department, commission, board, bureau or agency of the commonwealth except to the extent and in the manner provided in this act. The Authority is hereby constituted a public instrumentality, and the exercise by the Authority of the powers conferred by this act in the construction, operation and maintenance of the turnpike shall be deemed and held to be the performance of an essential governmental function.

From a reading of the quoted language, it can be seen that, as is the case with the Port Authority, the Turnpike Authority is essentially independent

of control by other state agencies.[3] Moreover, like the Port Authority, the Turnpike Authority is self-supporting. It is financed through bonds which it issues pursuant to G.L. c. 81 App., §1-8, and through tolls which it collects pursuant to G.L. c. 81 App., §1-10. Thus, it appears that, like the Port Authority, the Turnpike Authority was intended to operate in a manner similar to that of an independent business. *See generally Opinion of the Justices,* 334 Mass. 721, 734 (1956) ("It seems . . . that the [Turnpike] Authority must constitute an entity in and of itself and must have an existence apart and distinct from that of the commonwealth"). *See also Boston v. Massachusetts Port Authority,* 364 Mass. 639, 655, fn. 29 (1974) (noting similarities between enabling legislation of the two authorities).

Since I am of the opinion that the Turnpike Authority was intended to operate as does a private business, I must, for the reasons that were applicable to the Port Authority, conclude that the Turnpike Authority also lies outside the scope of the Commonwealth's small business purchasing program.

Massachusetts Bay Transportation Authority

The statutory authorization for the Massachusetts Bay Transportation Authority (MBTA) is contained in G.L. c. 161A, §2, which provides:

> The territory within and the inhabitants of the fourteen cities and towns and the sixty-four cities and towns are hereby made a body politic and corporate and a political subdivision of the commonwealth under the name of Massachusetts Bay Transportation Authority. The authority shall have power to hold property, to sue and be sued in law and equity and to prosecute and defend all actions relating to its property and affairs. The authority shall be liable for its debts and obligations, but the authority shall not be subject to attachment nor levied upon by execution or otherwise. Process may be served upon the treasurer of the authority or, in the absence of the treasurer, upon any member of the board of directors of the authority.

Unlike the case of the entities previously discussed, the enabling legislation of the MBTA provides it with no general exemption from control by other state agencies. Rather, its exemption, contained in G.L. c. 161A, §3(i), is limited to the following:

> Except as otherwise provided in this chapter, the directors of the authority shall determine the character and the extent of the [transportation] services and facilities to be furnished, and in these respects their authority shall be exclusive and shall not be subject to the approval, control or direction of any state, municipal or other department, board or commission.

[3]It should be noted that, unlike the Port Authority, the Turnpike Authority is subject to state control in one respect. By virtue of G.L. c. 81 App., §1-5(m), it is subject to the laws regarding public construction contracts in the same manner as are other state agencies.

Thus, the Authority may determine the character and extent of transportation services in an independent manner. However, in other respects, the Authority is subject to substantial state control. For example, G.L. c. 161A, §5(q), states that "the capital investment program and plans of the authority for mass transportation shall be prepared under the direction, control and supervision of the [Executive Office for Transportation], in conjunction with other transportation programs and plans." Moreover G.L. c. 161, §5(i), provides that the budget of the Authority is also subject to review by the Executive Office for Transportation. Further, G.L. c. 161A, §20, vests the Governor with authority, in the event of a public emergency, to assume control of the Authority's operations temporarily. General Laws c. 161A, §22, provides that in the event of a conflict between the regulatory powers of the Authority and those of the Department of Public Utilities, the latter agency shall prevail. Finally, G.L. c. 161A, §§28 and 28A provide that, with the approval of the Executive Office for Administration and Finance, the Commonwealth may afford the Authority contract assistance by absorbing certain of its expenses.

Given the statutory framework set forth above, I am unable to discern any intent on the part of the General Court to exempt the Authority from the operation of programs such as that established by St. 1976, c. 484. Therefore, I conclude that the Authority is a "purchasing agency" within the meaning of St. 1976, c. 484, §2(4) and is subject to the Commonwealth's small business purchasing program.

I now turn to your second question, whether administrative expenditures and expenditures for consultant services should be excluded in computing the base from which at least five percent is to be allocated to small business purchases. Section 3 of St. 1976, c. 484 provides, in part:

> . . . it shall be the responsibility of the [Secretary of Administration and Finance] to ensure that, with respect to each fiscal year, the aggregate amount of the purchases included in this program shall equal or exceed five per cent of the aggregate amount of all purchases made by the commonwealth.

The term "purchases" is defined in St. 1976, c. 484, §2(3) as follows:

> . . . contracts by which a purchasing agency agrees to buy goods or services from a specified vendor at a specified price and according to various specified conditions.

Reading the two sections literally, one might conclude that virtually any expenditure made by an agency must be included in computing the expenditure base. However, there are some expenditures which the General Court could not have intended to include in that base. One example is the salary of agency personnel. Another is the cost of utilities. Thus, further refinement of the term "purchases" in §3 is called for. By the terms of §2, the responsibility of rendering such refinement rests with the Secretary of Administration and Finance. Section 2 provides:

> The secretary, after consultation with the commissioner, shall establish more detailed definitions which shall use, among other

things, sales volume and number of employees. The definitions may vary from industry to industry to the extent necessary to reflect differing characteristics of such industries.

The General Court clearly intended to vest the Secretary with a great deal of discretion in this area. In these circumstances I shall withhold my views on which purchases are to be included in the expenditure base and defer to your judgment. Accordingly, I respectfully decline to answer your second question.

Your final question is whether expenditures made from trust funds are to be included in computing the expenditure base for purposes of the program. As in your second question, this inquiry deals with a subject which falls within your zone of discretion under the statute. Accordingly, I again defer to your judgment and respectfully decline to answer your third question.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 26. March 25, 1977

John J. Carroll, Commissioner
Department of Public Works
100 Nashua Street
Boston, Massachusetts 02114

Dear Commissioner Carroll:

You have asked my opinion on the applicability of G.L. c. 141, relating to the jurisdiction and powers of the Board of State Examiners of Electricians, to certain work performed by or under the supervision of the Department of Public Works. You have posed six questions which are set forth in the margin.[1] Nevertheless it is my view that your request essentially raises but two related issues, and I have organized this response accordingly: (1) Is general lighting work on public ways performed by the Commonwealth of Massachusetts, (i.e. the Department of Public Works, its agents or employees,) subject to the supervisory licensing authority granted to the State Board of Electricians by G.L. c. 141? (2)

[1] 1. Is work by the Massachusetts Department of Public Works in and on state highways which are the property of the Commonwealth subject to the licensing authority of the Board of State Examiners of Electricians under M.G.L. c. 141?

2. Is work by the Massachusetts Department of Public Works in and on local public ways subject to the licensing authority of said Board under M.G.L. c. 141?

3. Is traffic light installation work exempted from M.G.L. c. 141 by the section 7 lighting of public ways exemption?

4. Is traffic light installation work outside the business of installing wires and conduits for carrying electricity for light, heat or power purposes and therefore not subject to the licensing authority of said Board M.G.L. c. 141?

5. Does the exemption for lighting of public ways in section 7 of M.G.L. c. 141 apply to street lighting installed by employees of the Department?

6. Does the exemption for lighting of public ways in section 7 of M.G.L. c. 141 apply to street lighting installed by private contractors or sub-contractors working under contract to the Department?

Is there any difference in treatment or interpretation of the applicability of G.L. c. 141 when the work being performed is related to traffic light installation rather than general street lighting? For the reasons detailed below, it is my opinion that neither general street lighting nor traffic light work performed by the Department or its agents and employees on public ways is subject to the licensing requirements contained in G.L. c. 141.

General Laws c. 141, §1 provides that "[n]o person, firm or corporation shall enter into, engage in, or work at the business of installing wires, conduits, apparatus, fixtures or other appliances for carrying or using electricity for light, heat or power purposes" without having received a license and certificate from the state examiners of electricians. However, the Commonwealth is not a "person, firm or corporation." G.L. c. 4 §7, the general definitional section for all of the General Laws, defines "person" as including "corporations, societies, associations and partnerships", but contains no mention of the Commonwealth, its departments or agencies. "[I]t is a widely accepted rule of statutory construction that general words in a statute such as "persons" will not ordinarily be construed to include the state or political subdivisions thereof." *Hansen* v. *Commonwealth*, 344 Mass. 214, 219 (1962); *Perez* v. *Boston Housing Authority*, 1975 Adv. Sh. 2294, 331 N.E. 2d 801. Thus, unless explicitly included, the Commonwealth ordinarily[2] is not held to be subject to general regulating statutes. *Perez, supra.* The language of G.L. c. 141, interpreted in light of this general rule, does not subject the Commonwealth to the licensing authority of the Board.[3]

This rule requiring explicit reference to the Commonwealth arises from the fact that agency licensing power derives from the police power of the Legislature, acting under the authority of the State Constitution. Op. Atty. Gen. (1957-1958) p. 65. The assumption is that the state, which exercises the police power to protect the public health and safety, will not disobey its own laws. Therefore, such laws do not apply to the state unless the statutory language and purpose clearly indicate that it was the intent of the Legislature that they apply. Sutherland, *Statutory Construction*, Vol. III, §62.01.

On the basis of the express language of the statute and general rules of statutory interpretation, I therefore conclude that the Commonwealth is not a "person, firm or corporation" within the context of G.L. c. 141 §1 and that the licensing requirements of G.L. c. 141 do not apply to lighting work performed by the Commonwealth on public ways.[4]

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[2]Exceptions to this general rule are summarized in 4 Op. Atty. Gen. 432 (1915). In my opinion the exceptions are inapplicable to your request and do not warrant further discussion.

[3]Further, comparison of G.L. c. 141 with other regulatory statutes reveals that where the Legislature wishes to include the Commonwealth, it does so explicitly. *See, e.g.*, G.L. c. 143 §2A (inspection of buildings); G.L. c. 111 §150A (regulation of public health).

[4]Moreover, even if this were not the general rule, it is questionable whether the Commonwealth would be viewed as enter[ing] into, engage[ing] in, or work[ing] at the business of installing wires, so as to come within the ambit of the statute. Clearly, the Commonwealth is not engaged in this activity for profit, a typical connotation of the word "business". *See, also, DeBlais* v. *Commissioner of Corporations and Taxation*, 276 Mass. 437, 439 (1931); *Whipple* v. *Commissioner of Corporations and Taxation*, 263 Mass. 476, 485-486 (1928).

Because the Commonwealth does not come within the terms of c. 141, both its street and traffic lighting work are exempt;[5] the DPW may therefore pursue its statutory duties outlined in G.L. c. 85, §2, and may "erect and maintain on state highways and on ways leading thereto, and on all main highways between cities and towns, such direction signs, . . . lights, . . . mechanical traffic systems, . . . as it may deem necessary for promoting the public safety and convenience . . ." without being subject to the provisions of G.L. c. 141.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 27. March 31, 1977
John R. Buckley
Secretary of Administration and Finance
State House
Boston, MA 02133

Dear Mr. Buckley:

You have requested my opinion concerning whether consultants (on account), volunteers, and interns are considered employees while serving under the supervision and control of an officer or employee of the Commonwealth, thereby permitting their use of state-owned motor vehicles for authorized travel on official business.

As stated in a prior opinion of the Attorney General, 1975-76 Op. Atty. Gen. No. 26 (September 10, 1975), G.L. c. 12, §3B provides limited indemnification to officers and employees of the Commonwealth and of the Metropolitan District Commission when operating state-owned vehicles under the conditions specified in that section. Consistent with that Attorney General Opinion I shall confine my analysis of the employee status of consultants, volunteers and interns to the common law definitions of the relevant terms. Such an analysis requires that I focus on the degree of supervision and control exerted over consultants, volunteers and interns by an officer or employee of the Commonwealth, since that is the critical factor in determining whether persons filling such positions are, themselves, considered to be employees of the Commonwealth for purposes of G.L. c. 12 §3B.

It is my opinion that there is insufficient supervision and control exercised over persons functioning in a consultant capacity to accord such individuals the status of "employee" for purposes of G.L. c. 12 §3B. In *Griswold v. Director, Division of Employment Security*, 315 Mass. 371 (1944) the Supreme Judicial Court indicated that supervision and control exerted over an employee extends to the means and methods of per-

[5]Because it is my opinion that c. 141 does not apply to any electrical work performed by the Commonwealth, I do not reach the issue raised by questions 3, 5 and 6 concerning exemptions from c. 141 as listed in §7. I also do not reach any implicit questions in your request concerning the respective jurisdictions of labor unions. Such questions are more appropriately resolved in other forums.

forming work as well as ultimate control over the results to be accomplished. Consultants, however, operate within no such limitations. In a former Attorney General Opinion, for instance, it was assumed that any consultant hired by the Vocational Rehabilitation Planning Commission would render professional services without immediate supervision by any officer or employee of the Commonwealth and, therefore, would be a "non-employee." 1966-67 Op. Atty. Gen. p. 70 (August 30, 1966). In fact, that opinion characterized the relationship between a consultant and an agency of the Commonwealth as one in which the agency would be the consultant's client rather than employer. Therefore, a consultant would not be entitled to the limited indemnification accorded to employees of the Commonwealth when operating state-owned vehicles under the conditions specified in G.L. c. 12, §3B.

With respect to volunteers I am of the similar opinion that they may not be considered to be employees even while serving under the supervision and control of an officer or employee. In arriving at this conclusion I have contrasted the situation of volunteers with that of students employed by the Commonwealth on a part-time basis. When an opinion of a prior Attorney General took the position that such students were to be considered employees for the purpose of c. 12 §3B while operating a motor vehicle in the course of such employment, the opinion emphasized that the employee status resulted from the performance of:

> services subject to the will and control of their supervisor both as to what shall be done and how it shall be done. We have the right to discharge such individuals and we furnish any tools required and a place to work. We consider their wages to be taxable, and therefore, report their earnings for income tax purposes. 1962-63 Op. Atty. Gen. p. 179 (May 1, 1962)

With respect to volunteers, it is plain that the same indicia of control are lacking even though a degree of supervision may exist.

Finally, with respect to interns, in order to determine their employee status under c. 12 §3B I would need to know their precise job description, title, and salary status. Whereas a non-salaried intern would resemble a volunteer, a salaried intern would more closely resemble a "work-study" student or other part-time employee of the State who would be an employee for the purpose of c. 12 §3B according to the Attorney General Opinion rendered May 1, 1962.[1] Thus, no definitive response can be given in relation to a general "intern" category.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[1]I should note that any decision I would reach with respect to a salaried intern would not be influenced by the type of account out of which such an individual was paid. The Attorney General Opinion of May 1, 1962 which determined that students and others employed on a part-time basis by the State as the term is used in G.L. c. 12 §3B took this position despite the fact that the wages of such individuals were paid from funds under subsidiary account — 03 "Services — Non-Employees."

Number 28. April 5, 1977

Mr. Thomas C. McMahon
Director
Division of Water Pollution Control
100 Cambridge Street
Boston, MA 02108

Dear Mr. McMahon:

You have requested my opinion on a series of questions concerning the administration of the Massachusetts Clean Waters Act. G.L. c. 21, §§26-53. Under that Act, the Division approves applications by municipalities[1] for federal aid, and makes grants of state aid to municipalities for the development of wastewater treatment facilities. G.L. c. 21, §33. These projects are undertaken and funded in three stages: preliminary planning (Step I); final design (Step II); and construction (Step III). Your request seeks a clarification of how municipalities may, consistent with the statutes controlling municipal finance, encumber and expend these state and federal grant funds.

I shall address the questions you have posed in three groups: (I) the first and second questions concern the expenditure of federal and state funds; (II) the third, fourth, and fifth questions concern the amount of local appropriation necessary to authorize municipal borrowing in anticipation of federal and state grants; (III) the sixth and seventh questions concern the amount of local appropriation required to authorize execution of contracts for water pollution control projects.[2] I answer as follows: it is my opinion that the questions you pose may be answered in the affirmative, with the exception of question (5), which is answered in the negative.

I. *Expenditure of State and Federal Grants*

1. May a municipality or district proceed with a given Step of a water pollution control project and expend state and federal funds made available to it for said Step through grants and advances if it has appropriated only an amount equivalent to the local share of the Step?

2. May a municipality or district proceed with a given Step of a water pollution project and expend state and federal funds made available to it for said Step through grants and advances if, because state and federal funding totals 100% of the costs of the Step and the local share of said Step is zero, it has not made any appropriation for that Step?

Chapter 44 of the General Laws governs municipal finance in the Commonwealth. Section 53 of that statute directs that all municipal receipts are to be paid into the local treasury, and that funds may be spent therefrom only after appropriation.[3] Excepted from the general rule of Section

[1] Applications may also be made by water pollution abatement districts. *See* G.L. c. 21, §30A.
[2] My answers to these questions make no distinction between municipalities and water pollution abatement districts and apply equally to both forms of local government. See G.L. c. 21, §30A.
[3] Appropriation is the act of a legislative body designed to "set it [the money] aside or assign it to a particular purpose of use." *Kelley* v. *Sullivan*, 201 Mass. 34, 35-36 (1909); *See Opinion of the Justices*, 323 Mass. 764, 766 (1949).

53 are "sums allotted by the commonwealth to cities, towns or districts for water pollution control purposes." G.L. c. 44, §53(1). Municipalities may spend these funds without specific appropriation, so long as they are used either for the purpose for which the Commonwealth allotted them, or to meet temporary loans issued by the municipality in anticipation of allotment by the Commonwealth. A similar exception to the Section 53 mandate exists with respect to federal grants. Municipalities may accept these monies and expend them "without further [local] appropriation." G.L. c. 44, §53A.

On the basis of G.L. c. 44, §§53(1) and 53A, I answer questions 1 and 2 in the affirmative. Although a state or federal grant may require a local appropriation, the municipal finance statutes do not condition a municipality's ability to expend such grant monies upon an appropriation of local funds.

II. *Municipal Borrowing in Anticipation of Federal and State Grants*

> 3. May a municipality or district borrow in anticipation of receipt of federal or state grants for a given Step where it has only appropriated money for a portion of the Step not eligible for, and not to be funded by, state and federal grants?
>
> 4. May a municipality or district borrow in anticipation of receipt of federal or state grants for a given Step where it has only appropriated an amount of money equivalent to the local share of that Step?
>
> 5. May a municipality or district borrow in anticipation of receipt of federal or state grants for a given Step, where, because the state and federal funding totals 100% of the costs of the Step and the local share of said Step is thus zero, it has not made an appropriation for that Step?

Municipalities have no inherent power to borrow, and may only incur debt for the purposes specified, and in the manner prescribed by statute. *Brown* v. *City of Newburyport,* 209 Mass. 259, 265 (1911). G.L. c. 44, §6A and St. 1945, c. 74, §3, as amended by St. 1963, c. 92, §1, authorize municipalities to incur debt in anticipation of receiving state and federal grant funds. These statutes, as well as G.L. c. 44, §31, also establish conditions which must be satisfied prior to such borrowing.

G.L. c. 44, §6A and St. 1945 c. 74, §3, as amended, provide that a municipality which has provided a sum of money to be used with state[4]

[4]G.L. c. 44, §6A provides in part:
. . . If a city, town or district has appropriated a *sum of money* for the purposes of water pollution control *to be used with a sum or sums allotted by the division* of water pollution control in the department of environmental quality engineering, and is required primarily to pay that proportion of the expense for which reimbursement is to be received from the commonwealth . . . for the purpose of providing the necessary funds for which reimbursement is to be made . . . the treasurer [with the approval of the selectmen of a town, of the prudential committee of a district or of the official authorized by a city charter] . . . may . . . incur debt outside the debt limit and issue notes therefor for a period not exceeding two years from their dates . . . (emphasis provided).

or federal[5] funds for water pollution control projects may incur debt outside its debt limit in anticipation of receiving such state or federal funds. These statutes expressly condition municipal borrowing upon the appropriation of local funds for use in conjunction with state or federal funds. However, it is my opinion that these statutes only require a municipality to appropriate the amount of local funds to be provided at a given Step, and do not require a municipal appropriation of the total funds to be borrowed. 1975-76 Op. Atty. Gen. 40.

Similarly, I conclude that c. 44, §31 does not require a municipality to appropriate funds for the total debt incurred in anticipation of receiving state or federal funds. Section 31 prohibits municipal departments from incurring liabilities in excess of their appropriations. However, where implementation of a state policy depends upon municipal action, Section 31 has been narrowly interpreted. *Board of Health* v. *Mayor of North Adams,* Mass. Adv. Sh. (1975) 2708. Thus, where a city undertakes a long-term capital outlay project pursuant to a state statute encouraging such projects, §31 does not require an initial municipal appropriation in the full amount of the project's costs. *Lynn Redevelopment Authority* v. *City of Lynn,* 360 Mass. 503 (1971).

In the present case, the Massachusetts Clean Waters Act, G.L. c. 21, §§26-53, and the 1972 Amendments to the Federal Water Pollution Control Act, 33 U.S. C. §§1251 et seq., establish a clear policy encouraging the development of wastewater treatment facilities. Requiring a municipality to appropriate the total amount of debt when borrowing in anticipation of state or federal funds would impose a substantial burden on the municipality which is inconsistent with that policy. Therefore, I conclude that c. 44, §31 only requires a municipality to appropriate that amount of money which it will expend from its own funds at a given Step, prior to incurring debt under c. 44, §6A or St. 1945 c. 74, §3, as amended. *Board of Health* v. *Mayor of North Adams, supra* at 2723-2724; *Lynn Redevelopment Authority* v. *City of Lynn, supra* at 504-506.

In the cases presented by Questions 3 and 4, the conditions imposed by these statutes are satisfied. Municipal appropriations for ineligible costs clearly associated with a particular Step, or for the local share of eligible costs of a Step, provide funds needed to successfully complete that Step. Such appropriations satisfy the express requirement of c. 44, §6A and St. 1945, c. 74, §3, as amended, that local funds be provided for use with the state or federal funds. They also satisfy the requirements of c. 44, §31 by funding municipal liability at a given Step.

Question 5, when read in conjunction with the two preceding Questions, assumes a state of facts in which there are no municipal costs associated

[5]St. 1945, c. 74 §3, as amended by St. 1963, c. 92, §1, provides: If a county, city, town or district shall have an agreement with the federal government *whereby such government grants such county, city, town or district a sum of money to be used with funds provided by said county, city, town or district for a public works project* . . . and shall be required primarily to pay that portion of the expense for which reimbursement is to be received from the grant, the treasurer of such county, city, town or district, . . . in anticipation of the receipt of the proceeds of such grant, may incur debt, which, in the case of a city, town or district, shall be outside the debt limit, to an amount not exceeding the amount of the grant as shown by the grant agreement, and may issue notes therefor, payable in not exceeding two years from their dates. (Emphasis provided).

with a particular Step and no corresponding appropriation. If there is no municipal appropriation at a given Step, then there would be no local funds available for use with the state or federal funds provided at that Step. Since each Step is funded separately, local funds appropriated at an earlier Step are not in fact used with the state or federal funds committed at a later Step. In such cases, although c. 44, §31 is satisfied, the conditions of c. 44, §6A and St. 1945 c. 74, §3, as amended, are not. Accordingly, a municipality may not borrow in this case.

In summary, I conclude that a municipality may, consistent with the governing statutes, borrow in anticipation of receiving state or federal funds where it has made appropriations for the ineligible costs, or for the local share of eligible costs, associated with a given Step. A municipality may not borrow in anticipation of receiving state or federal funds at any Step if it has not made an appropriation of funds to be used at that Step.

III. *Muncipal Contracts in Excess of Local Appropriation*

> 6. May a municipality or district execute contracts for a Step of a water pollution control project where it has not appropriated the full amount of the costs of the Step, but has only appropriated an amount equivalent to its local share of the costs of the Step?
>
> 7. May a municipality or district execute contracts for a Step of a water pollution control project where, because state and federal funding totals 100% of the costs of the Step and the local share of the Step is thus zero, it has not made any appropriation for that Step?

Municipalities are authorized to make contracts for various purposes, including the construction of sewage treatment and disposal systems. G.L. c. 44, §4. However, in executing any contract relating to a water pollution control project, a municipality must comply with G.L. c. 44, §§31 and 31C. Section 31 is discussed at Part II of this opinion. It generally prohibits municipal departments from incurring liabilities in excess of their appropriations. *Id.* Section 31C provides in relevant part:

> No contract for the construction of any . . . public work by any city or town costing more than two thousand dollars shall be deemed to have been made until . . . an appropriation in the amount of such contract is made available therefore.

For the reasons set forth in Part II, *supra,* it is my opinion that these statutes do not require a municipality to appropriate the total amount of a Step's costs prior to executing contracts for that Step. Where a municipality is entitled to receive state or federal funds at a particular Step of a water pollution control project, G.L. c. 44, §§31 and 31C require a municipal appropriation in an amount equal only to the costs which the municipality will pay from its own funds. See authorities cited in Part II, *supra.* Such an interpretation is consistent with the numerous decisions

upholding multi-year municipal teaching contracts[6] and long term municipal service contracts.[7]

Therefore, I conclude that a municipality may execute contracts for the development of water pollution control facilities where it has only appropriated an amount equal to its costs at a given Step. Similarly, I conclude that a municipality may execute such contracts without making any appropriation therefore if it is entitled to receive state or federal funds covering the entire cost of a Step.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 29. April 14, 1977

Frank T. Keefe
Director of State Planning
John W. McCormack Building
One Ashburton Place
Boston, Massachusetts 02108

Dear Mr. Keefe:

You have advised me of the following facts. In 1968, pursuant to the provisions of G.L. c. 40B, §§9 and 10, the towns of Plymouth and Kingston became members of the Southeastern Regional Planning and Economic Development District. No change in the status of either town's membership in the District occurred until April, 1974, at which time Plymouth, by a majority vote at its annual town meeting, elected to terminate its membership in the District. Subsequently, in April of 1976, again by a majority vote at its annual town meeting, the town elected to apply for membership in the Old Colony Planning District. Thereafter the Old Colony Planning Council, by a majority vote, elected to accept Plymouth's application.

Similarly, in May of 1975, the Town of Kingston, by a majority vote at its annual town meeting, elected to terminate its membership in the Southeastern Regional Planning and Economic Development District. At the same time it, too, elected to apply for membership in the Old Colony Planning District. As was the case with Plymouth, the Old Colony Planning Council elected to accept Kingston's application.

On September 23, 1976, in a letter to the Director of the Federal Office of Management and Budget, the Commissioner of Commerce and Development redefined the boundary of the Old Colony Planning District to include the towns of Plymouth and Kingston. At the same time, he deleted those two towns from the Southeastern Regional Planning and Economic Development District. Both actions were the result of the purported changes in district described above.

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[6]See *Watt* v. *Chelmsford*, 328 Mass. 430 (1952); *Hayes* v. *Brockton*, 313 Mass. 641 (1943); *Ring* v. *Woburn*, 311 Mass. 679, (1942); *Callahan* v. *Woburn*, 306 Mass. 265 (1940).

[7]*See Salisbury Water Supply Co.* v. *Town of Salisbury*, 341 Mass. 42 (1967); *Wilson* v. *Brouder*, 291 Mass. 389 (1935); *Clark* v. *City of Fall River*, 219 Mass. 581 (1914).

In light of the facts set forth above, you have asked me a series of questions which I summarize as follows:

1. Have the towns of Plymouth and Kingston effectively terminated their membership in the Southeastern Regional Planning and Economic Development District and acquired new membership in the Old Colony Planning District?

2. If so, have the boundaries of the respective districts automatically changed to reflect the changes in their membership?

With one qualification, it is my conclusion that the two towns have effected a change in district and that the boundaries of the districts involved have automatically changed.

With respect to your first question, G.L. c. 40B, §10, provides two methods by which membership in the Southeastern Regional Planning and Economic Development may be terminated. The section states:

> . . . The [Commissioner of Commerce and Development] may from time to time review the boundaries of the district and, if he deems it in the best interest of the district, he may with approval of a majority of the members of the Southeastern Regional Planning and Economic Development Commission include additional cities and towns, or he may exclude cities and towns from said district; provided, however, that prior to such increase or decrease in the membership of the district, the commissioner shall consult with the mayor of a city, or the city manager in a city having a Plan D or Plan E form of government, or the selectmen of a town to be included or excluded from such district.
>
> The city or town may, after it has been a member of a regional planning and economic development district for a period of not less than five consecutive calendar years, terminate its membership in the district by a two thirds vote of the city council or by vote of a town meeting or town in favor of terminating such membership. Said termination shall become effective at the end of the calendar year within which said termination is voted.

It can be seen from the quoted language that one method of termination requires action on the part of both the Commissioner of Commerce and Development, and the Regional Planning and Economic Development Commission. Although you have indicated that the Commissioner of Commerce and Development has deleted the towns of Plymouth and Kingston from the Southeastern Regional Planning and Economic Development District, there is nothing before me to indicate that a majority of the Regional Planning and Economic Development Commission has approved his actions. Without such approval, the membership of Plymouth and Kingston could not have been terminated under the first method set forth in §10.

The second method set forth in §10 for terminating membership in the district requires that the town seeking termination has been a member of

the district for five consecutive years and that there be a town meeting vote in favor of termination. The information which you have provided me indicates that the Towns of Plymouth and Kingston have met both of those requirements. Accordingly, I conclude that as of January 1, 1975, the Town of Plymouth effectively terminated its membership in the district. I further conclude that as of January 1, 1976, the Town of Kingston effectively terminated its membership in the district.

Regarding admission of the two towns into the Old Colony Planning District, St. 1967, c. 332, §6, provides that new members will be admitted to the district under the following circumstances:

> Any . . . city which, by vote of its city council, and any . . . town which, by vote of a town meeting, applies to the [Old Colony Planning] council for inclusion in the district and whose application is approved by a majority vote of the council shall become a member of the district with equal rights and privileges with other members; provided that any such city or town is within an urbanized area adjoining the district and has common or related problems.

Under this section three conditions must be met before a new town may be admitted to the district. First, there must be a town meeting vote applying for membership. Second, a majority of the Old Colony Planning Council must approve the application. Third, the town must be located within an urbanized area adjoining the district and have common or related problems.

The information you have provided me indicates that the first two conditions have been met in this case. However, you have provided me with no information concerning compliance with the third condition. I therefore conclude as follows: If the Towns of Plymouth and Kingston are located within an urbanized area adjoining the district and have problems common or related to those of the district, then they effectively become members of the district upon receiving the approval of the Old Colony Planning Council. However, if said towns are not located within an urbanized area adjoining the district or do not have problems related or common to those of the district, then they have not become *bona fide* members of the district.

With regard to your second question, whether a change in membership results in an automatic change in the boundaries of the district involved, I conclude that an automatic change does occur. According to the two statutes, G.L. c. 40B, §10, and St. 1967, c. 332, §6, quoted above, the territory of a district consists, by definition, of the territory of its respective members.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 30. April 29, 1977

Hon. Charles V. Barry
Secretary
Department of Public Safety
905 Commonwealth Avenue
Boston, MA 02215

Dear Secretary Barry:

You have requested my opinion as to the proper interpretation of G.L. c. 148, §9, as amended by St. 1975, c. 764. That statute authorizes the Board of Fire Prevention in the Department of Public Safety (Board) to enact rules and regulations controlling the use and storage of explosives and inflammable materials. The statute also authorizes municipalities to regulate such matters so long as the municipal ordinance or by-law is "not inconsistent with [the Board's] rules and regulations".

With respect to municipal regulations, c. 148, §9 provides that the municipal enactment be submitted to the Board for approval, prior to its taking effect. If the Board takes no action within ninety days of receipt, then the by-law or ordinance is deemed approved. Your question relates to that aspect of the approval process which specifies that "[e]ach city or town shall submit a copy of each such ordinance or by-law to the Board within ten days after the passage thereof." c. 148, §9. You ask whether failure to submit the appropriate copy within ten days precludes approval by the Board. It is my opinion that the ten-day filing requirement should not be used in this restrictive fashion; failure to file in time does not preclude the Board's jurisdiction.

Section 9 does specify that the municipality "shall submit" the ordinance or by-law. However, the legislature's use of the word "shall" does not, by itself, dispose of the issue. The Supreme Judicial Court has consistently taken the view that time requirements set forth by statute are often directory in nature, rather than mandatory, and that flexibility is called for in judging the impact of the law. *See Kiss* v. *Board of Appeals of Longmeadow,* Mass. Adv. Sh. (1976) 2355. "The word 'shall' as used in statutes, although in its common meaning mandatory, is not of inflexible signification and not infrequently is sustained as permissive or directory in order to effectuate a legislative purpose." *Swift* v. *Registrars of Voters of Quincy,* 281 Mass. 271, 276 (1932); *see also Boston* v. *Quincy Market Cold Storage Co.,* 312 Mass. 638, 646-647 (1942).

In determining when a flexible approach is appropriate, the context in which the time requirement appears is a key element. Whether a requirement such as that contained in §9 is mandatory or directory must be ascertained from "the legislative intent disclosed by the enactment as an entirety in the light of its dominant purpose . . ." *Swift* v. *Registrars of Voters of Quincy, supra,* 276. In general, where the requirement is "intended to promote method, system and uniformity in the modes of proceeding . . .", *Torrey* v. *Millbury,* 38 Mass. (21 Pick) 64, 67 (1838) and the substantive rights of third parties are not prejudiced, the provision in

question will be interpreted as directory only. *E.g., Schulte* v. *Director of the Division of Employment Security,* Mass. Adv. Sh. (1975) 3247, 3251-3255; *Hallenborg* v. *Town Clerk of Billerica,* 360 Mass. 513, 517 (1971).

Section 9 is an integral part of G.L. c. 148, which is "designed to provide licensing by fire prevention authorities of substantial use of materials deemed by the [department of public safety] to be highly flammable." *Frontier Research Inc.* v. *Commissioner of Public Safety,* 351 Mass. 616, 620 (1967). The filing of an ordinance or by-law by a municipality more than 10 days after passage of that ordinance or by-law would in no way thwart the public safety objectives of c. 148. It is particularly significant in this regard that a municipal enactment does not go into effect until either the board has approved the enactment or ninety days have elapsed without board action. The ninety days does not begin to run until the board has received the ordinance or by-law. Late filing in no way impedes the exercise of the board's regulatory authority. Nor does late filing have the effect of precluding citizen comment which would be otherwise available either at the local or Board level.

In conclusion, it is my opinion that the words "shall submit" in §9 are directory, not mandatory. If an ordinance or a by-law is submitted to the Board more than 10 days after enactment, the board may[1] proceed to decide on the merits whether or not the ordinance or by-law is consistent with the Board's regulations.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 31. April 29, 1977

Honorable Carol S. Greenwald
Commissioner of Banks
Division of Banks and Banking
100 Cambridge Street
Boston, Massachusetts 02202

Dear Commissioner Greenwald:

Your office has directed to me a series of questions which I summarize as follows:

> In cases where the savings department of a savings bank which sells life insurance has generated a tax credit pursuant to the provisions of INT. REV. CODE OF 1954, §38, and has no tax liability against which it may employ such credit, may the life insurance department, consistent with the provisions of G.L. c. 178, §8, employ the credit to reduce its own tax liability?

In my judgment, this transfer of excess tax credit is permissible.

[1]It should be noted that this statute does not require the Board to waive the time limit. The Board has discretion, in order to prevent undue delay and to promote efficient administration, to reject late-filed by-laws and ordinances where it deems such action necessary.

A savings bank operating both a savings department and life insurance department is required to pay federal income taxes under INT. REV. CODE OF 1954, §594. Pursuant to §594, the bank's total income tax liability consists of the sum of two partial taxes which are assessed separately against the savings department and the life insurance department as though the departments were independent corporations. The tax upon the savings department is computed using the formula established under INT. REV. CODE OF 1954, §11. The computations are shown on Internal Revenue Form 1120. The tax upon the life insurance department is computed using the formula established under INT. REV. CODE OF 1954, §§801 *et seq.* These computations are shown on Internal Revenue Form 1120L.

Under the provisions of INT. REV. CODE OF 1954, §38, corporations investing in certain kinds of depreciable property are awarded a credit against their federal income tax. Because the savings department and the life insurance department are each taxed as though they were separate corporations, each department is eligible for this credit.

In 1971, a savings bank selling life insurance requested the advice of the Internal Revenue Service as to whether it might employ an unused portion of the investment credit awarded one department to offset the tax liability incurred by the other department. The Internal Revenue Service ruled in the affirmative. What was determinative in its view, was the fact that, although the bank operated two separate and distinct departments, each with taxes computed independently of the other, there was ultimately but a single tax imposed upon the bank. *See Revenue Ruling* 71-386.

Essentially, your question is whether the provisions of G.L. c. 178, §8, prohibit Massachusetts savings banks which sell life insurance from taking advantage of the above-described ruling. Section 8, *inter alia,* imposes the following requirement upon such banks:

> The savings department and the insurance department shall be kept distinct . . . in matters of accounting and of investment. Expenses pertaining to the conduct of both the savings department and the insurance department, such as office rent and the salaries of general officers, shall be apportioned by the trustees equitably between the two departments.

For the reasons set forth below, I believe that §8 does not prohibit Massachusetts banks from undertaking the transactions authorized by *Revenue Ruling* 71-386.

Because a savings bank's total federal tax liability is derived from separate partial taxes imposed upon the savings department and the life insurance department, the total tax liability is clearly an "expense pertaining to the conduct of both departments" within the meaning of §8. As such, it must be "apportioned equitably" between the two departments. The question of what constitutes an "equitable apportionment" is thus the fundamental issue before me. In resolving that issue, I take special note of the legislative intent underlying the statute, which is to prevent a commingling of assets between the two departments. *See, e.g., Howard* v.

Harris, 90 Mass. 247, 248 (1864) ("statutes are to be construed according to the intentions of the framers.") In this instance, I interpret the requirement of an "equitable apportionment" to mean that when each department has generated a portion of the bank's total tax liability, each must discharge its share. Similarly, when the bank's total tax liability has been created entirely by one department, that department must discharge all of such liability. Furthermore, if one department has produced a credit which serves to reduce the bank's total tax liability, the portion the bank's total liability attributable to that department must first be reduced by the amount of the credit. However, where one department's credit exceeds the amount of its own liability, I regard it as "equitable" under the terms of §8 to reduce the other department's tax liability by the amount of the unused portion of the credit. In my opinion, there is no commingling of assets of the two departments resulting from the fact that the one department has availed itself of the unused portion of credit earned by the other department.

Accordingly, I conclude that G.L. c. 178, §8 does not prohibit one department of a savings bank from employing the unused portion of the other department's investment credit to reduce the bank's total tax liability.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 32. May 18, 1977

Christine Sullivan, *Secretary*
Executive Office of Consumer Affairs
14th Floor
One Ashburton Place
Boston, Massachusetts 02108

Dear Ms. Sullivan:

You have requested my opinion concerning the obligations of certain boards of registration[1] to permit public access to information compiled and maintained by them concerning members of regulated trades and professions. Your inquiry raises three general questions. The first question presented is whether personal information required for registration or certification is to be made available to the public. The second is whether information relating to disciplinary proceedings is to be made available to the public. The third concerns the manner in which any such information is to be made available to the public, by personal inspection of

[1]This opinion solely concerns the following boards of registration: Medicine, c. 112, §§2-12R; Podiatry, c. 112, §§13-22; Pharmacy, c. 112, §§24-42A; Dental Examiners, c. 112, §§43-53; Veterinary Medicine, c. 112, §§54-60; Architects, c. 112, §§60A-60O; Optometry, c. 112, §§66-73B; Dispensing Opticians, c. 112, §§73C-73L; Nursing, c. 112, §§74-81C; Professional Engineers and Land Surveyors, c. 112, §§81D-81T; Embalmers and Funeral Directors, c. 112, §§82-87; Barbers, c. 112, §§87F-87S; Real Estate Brokers and Salesmen, c. 112, §§87PP-87DDD; Chiropractors, c. 112, §§89-97; Nursing Home Administrators, c. 112, §§108-117; Electricians, c. 141, §§1 et seq.

records in the possession of the various boards, or by preparation and distribution of lists containing the public information. To summarize my conclusions, it is my opinion that certain information compiled and maintained by the boards of registration constitute public records and must be made available to the public upon request pursuant to General Laws, Chapter 66, §10. The manner in which such information is to be made available is, in certain cases, determined by statute, and in others, left to the discretion of the boards.

I. IS PERSONAL INFORMATION CONNCERNING MEMBERS OF REGULATED TRADES AND PROFESSIONS WHICH IS COLLECTED BY THE BOARDS OF REGISTRATION IN CONNECTION WITH THE LICENSING OR CERTIFICATION PROCESS TO BE MADE AVAILABLE TO THE PUBLIC?

This general statement of your inquiry subsumes several specific questions. Specifically, you have asked whether the names, addresses, registration numbers, age, marital status and qualifications (educational, professional, and personal) of members of the regulated trades and professions are subject to public disclosure. To answer these questions, it is necessary, at the outset, to establish the relationship among various statutes governing disclosure of information held by the government.

These statutes may be described as follows. First, the Fair Information Practices Act, G.L. c. 66A, inserted by St. 1975, c. 776, §1, specifically regulates the government's use of personal information relating to identifiable individuals. Second, there are numerous statutes which explicitly provide for public access to specific kinds of personal information concerning members of regulated trades or professions. Third, the Public Records Act, G.L. c. 66, §10 and its definitional counterpart c. 4, §7 cls. 26, as amended by St. 1973, c. 1050, §1, generally provides for public access to all records held by the government, unless the information falls within one of nine limited exemptions.

The Fair Information Practices Act (hereinafter referred to as FIPA) provides that every agency of the commonwealth maintaining a personal data system shall:

> not allow any other agency or individual not employed by the holding agency to have access to personal data *unless such access is authorized by statute* or regulation, or is approved by the holding agency and by the data subject whose personal data is sought. G.L. c. 66A, §2(c). [Emphasis added]

The boards of registration listed in footnote 1, *supra,* are agencies of the Commonwealth. G.L. c. 66A, §1 (definition of "agency"). Furthermore, these boards collect and maintain information concerning individual members of the regulated trades and professions which is identifiable as such. This information is, for purposes of FIPA, "personal data", and the records maintained by these boards are collectively "personal data systems." *Id.*

Therefore, it is my opinion that the boards of registration are subject to the restrictions of FIPA set forth above. Names, addresses, registration

numbers and other personal data relating to members of regulated trades and professions may not be disclosed, unless such disclosure is authorized by statute or otherwise made in accordance with c. 66A, §2(c).

Two kinds of statutes may authorize disclosure of personal data. In the first instance, there are specific statutes which explicitly authorize public access to certain information held by the boards of registration. For example, the Board of Registration in Medicine is expressly required to make available for public inspection at the office of the Secretary of State a record of names of registered medical doctors. G.L. c. 112, §4. The Board of Registration of Professional Engineers and Land Surveyors is required to make available for public inspection much more detailed information concerning licensees, including name, age, residence, business address, and educational and professional qualifications. G.L. c. 112, §81H. Despite the lack of uniformity, each board herein considered is under some statutory obligation to make certain personal data which it holds public.[2] To the extent that a specific statute requires a particular board to make names, addresses or other personal data available for public inspection, access to such information is authorized by statute and permitted by c. 66A, §2(c).

In addition to the specific statutes which authorize public access to certain enumerated kinds of personal data, it is my opinion that the Public Records Law (hereinafter called the PRL) may also authorize access to information under c. 66A, §2(c). The PRL consists of two parts. G.L. c. 4, §7 cls. 26 defines "Public Records" to include all ". . . documentary materials or data . . . made or received by any officer or employee of any agency, executive office, department, board, commission . . ." unless such data falls within one of nine exemptions.[3] G.L. c. 66, §10(a) requires

[2]The following is a list of the statutes requiring the various boards of registration to make certain information available to the public: Medicine, c. 112, §4 (list of names); Podiatry, c. 112, §17A (list of names); Pharmacy, c. 112, §25 (list of names); Dental Examiners, c. 112, §§43, 44 (list of names and business addresses); Veterinarians, c. 112, §57 (list of names); Architects, c. 112, §60J (names and business addresses); Optometry, c. 112, §67 (list of names); Dispensing Opticians, c. 112, §73F (list of names); Nurses, c. 112, §78 (list of names); Professional Engineers and Land Surveyors, c. 112, §81H (names, ages, residences, business addresses, education and qualifications and additional information); Embalmers and Funeral Directors, c. 112, §85 (the board's financial transactions); Barbers, c. 112, §87G (names, business addresses of licensees, students and apprentices); Real Estate Brokers and Salesmen, c. 112, §87XX (list of names, addresses and additional information); Chiropractors, c. 112, §90 (list of names); Nursing Home Administrators, c. 112, §114 (names, ages, residences, business address, education and qualifications, and additional information); Electricians, c. 141, §3 (list of names).

[3](a) specifically or by necessary implication exempted from disclosure by statute;
(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;
(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an invasion of personal privacy;
(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subparagraph shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.
(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;
(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;
(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subparagraph shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;
(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases;
(i) appraisals of real property to be acquired until (1) an agreement is entered into; or (2) three years have elapsed since the making of the appraisal, or until any litigation relative to such appraisal has been terminated, whichever occurs first.

every person having custody of any public record to permit it to be examined by any person. The information compiled by the boards of registration in connection with the licensing and certification process although "personal data" subject to protection by FIPA, also falls within the definition of a "public record". The question then is whether the PRL is to be construed as a statute authorizing access to personal data under c. 66A, §2(c).

It is well established that, where two or more statutes relate to the same subject matter, they are to be construed together to constitute a harmonious whole consistent with the legislative purpose. *Board of Education* v. *Assessors of Worcester,* 1975 Mass. Adv. Sh. 2626, 333 N.E. 2d 450 (1975). "There is no question that the Public Records Law is designed to be broadly construed to permit the public to have liberal access to governmental records so that the business of government may be conducted in the open under full public scrutiny." *Bellotti* v. *Cramer,* 5 MLW 502, (Hampshire Super. Ct. #16186, 4/15/77). *See also Department of the Air Force* v. *Rose,* 325 U.S. 352 (1976), *citing Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 80 (1973) (Federal Freedom of Information Act broadly conceived to permit access to official information long shielded unnecessarily from public view).

Opposed to this mandate to provide maximum public access to government records, is the sweeping definition of "personal data" contained in FIPA ("any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual." c. 66A, §1). To construe §2(c) of FIPA narrowly to prevent access to *all* personal data held by the government, except in cases where a very specific statute (such as those cited in footnote 2 *supra*) expressly authorizes disclosure, would effectively defeat the legislative purpose of the PRL.

However, to construe the PRL as authorizing public access to certain personal data gives effect to each statute. The nine exemptions to the PRL, preserve FIPA's restrictions on disclosure of personal data in those cases in which there is a recognized interest in doing so. In particular, exemption (c) preserves the confidentiality of personal data the disclosure of which "may constitute an invasion of privacy." Therefore, construing these statutes together *(Board of Education* v. *Assessors of Worcester, supra),* I conclude that the PRL may constitute statutory authorization to obtain access to personal data under c. 66A, §2(c). Personal data which does not qualify under one of the nine exemptions to the Public Records Act is subject to the mandatory disclosure provisions of c. 66, §10(a). Personal data which comes within one of the nine exemptions is not subject to mandatory disclosure and is fully protected by the restrictions of c. 66A, §2(c).[4]

The application of this rule to the specific questions you have asked requires an analysis of the exemptions to the PRL and of the type of

[4]A similar relationship exists between the Federal Privacy Act, 5 U.S.C. §552a and the Federal Freedom of Information Act, 5 U.S.C. §552. The Federal Privacy Act expressly provides that its restrictions on access to personal information is inapplicable to records the disclosure of which is *required* under §552 . . . [emphasis supplied].

information to which access is sought. Of the nine exemptions, I find that only exemption (c) is relevant.[5] This exemption applies to "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an invasion of personal privacy." Whether this exemption applies to particular types of personal data depends upon a balancing of the individual's privacy interest in nondisclosure against the public's interest in being informed. *Dennis-Yarmouth Regional School District* v. *Kelley,* 5 M.L.W. 324 (Barnstable Super. Ct., #CA 36592, 2/10/77). For cases discussing the balancing of interests under the Federal Freedom of Information Act, 18 U.S.C. §552(b) (6), *see Department of the Air Force* v. *Rose, supra; Ditlow* v. *Schultz,* 517 F.2d 166 (D.C. Cir. 1975); *Rural Housing Alliance, Inc.* v. *U.S. Department of Agriculture,* 498 F.2d 73 (D.C. Cir. 1974); *Columbia Packing Co., Inc.* v. *U.S. Department of Agriculture,* 417 F.Supp. 654 (D.Mass. 1976); *Getman* v. *NLRB,* 450 F.2d 670 (D.C. Cir. 1971). Exemption (c) has also been interpreted to mean "that if disclosure has any reasonable tendency to trespass on a legitimate concern of privacy, then the exemption prevents the disclosure." *Bellotti* v. *Cramer, supra.* In determining the extent of an individual's interest in keeping certain information private, whether such information contains intimate details of a personal nature is relevant. *See Ditlow* v. *Schultz, supra* at 169. *See also Hastings Sons Publishing Co.* v. *Bastarachi,* (Essex Super. Ct., #CA 5024, 8/13/76) (on appeal). Also relevant is the availability of such information from other sources. *Dennis-Yarmouth Regional School District* v. *Kelley, supra; Rural Housing Alliance, Inc.* v. *U.S. Department of Agriculture, supra* at 78.

Applying these principles to the specific types of personal data listed in your request, it is my opinion that names, addresses and registration numbers of licensees do not fall within exemption (c). Licensees' names are specifically made public by statute (see statutes collected in footnote 2), and addresses are generally available through telephone directories. Registration numbers and addresses serve primarily to identify and distinguish between individual members of the trades and professions. Such information conveys few or no personal details about the individuals so identified. Therefore, I conclude that such information does not fall within exemption (c). *Dennis-Yarmouth Regional School District* v. *Kelley, supra* (names, addresses and salaries of school district employees not exempted from public disclosure by c. 4, §7 cls 26(c)). *See also Getman* v. *NLRB, supra* (names and addresses of labor union members not exempted from public disclosure by 5 U.S.C. §552(b) (6)). Not being exempt, public disclosure of names, addresses and registration numbers of licensees is authorized by c. 66, §10(a).

[5]It is my opinion that personal data is not specifically or necessarily exempted from disclosure by FIPA, so as to come within exemption (a) of c. 4, §7 cls. 26. C.66A, §2(c) expressly recognizes that other statutes may authorize access to personal data. To then interpret that section as exempting all personal data from the Public Records Law, is circular and begs the question of whether the PRL is intended to authorize disclosure of such information. For a case discussing exemption (a) see *Ottaway Newspapers, Inc.* v. *Appeals Court,* Mass. Adv. Sh. , 5/11/77.

The remaining types of personal data covered by your request are age, marital status, education and professional and personal qualifications. It is my opinion that educational and professional training and experience are not exempted from disclosure by exemption (c). Such information is evidence of the skills required of licensees in the interests of public health and safety. *See generally Fogland* v. *Board of Registration in Medicine,* 357 Mass. 624, 629 (1970) (right of individual to practice a profession may be subject to paramount right of government to protect public health). In my opinion, this information is outside the scope of any reasonable or legitimate expectation of privacy which an individual might have. *See Bellotti* v. *Cramer, supra; Cf. Katz* v. *United States,* 389 U.S. 347 (1967). Since this information does not fall within exemption (c), it is a "public record", and c. 66, §10(a) authorizes its disclosure.

However, age, marital status, and other similar personal details are the kinds of information in which a licensee may well have a legitimate privacy interest. Such information is only indirectly related to professional ability and is of a highly personal nature. Federal courts have protected similar information concerning marital status and legitimacy of children, *Rural Housing Alliance, Inc.* v. *U.S. Department of Agriculture,* 498 F.2d 173 (D.C. Cir. 1974), medical files, *Ackerley* v. *Ley,* 420 F.2d 1336 (D.C. Cir. 1969), and employment or health records, *Robles* v. *NLRB,* 414 F.Supp. 426 (E.D. Pa. 1976). Therefore, absent an express legislative declaration that such information should be made public, e.g. c. 112, §811H, I find that these items of personal data are exempt under exemption (c). Since this information is exempt from the definition of a public record, c. 66, §10(c) does not authorize its disclosure.

My answers to the questions raised in this section may be summarized as follows. The information compiled by the boards of registration in connection with the licensing and certification process is personal data, the disclosure of which is restricted by G.L. c. 66A, §2(c). To the extent that specific statutes expressly make enumerated types of personal data public, they constitute statutory authorization to permit public access to such information. Absent specific statutes, the PRL provides statutory authorization to permit public access to the names, education and professional background, addresses, registration numbers of members of regulated trades and professions. However, the PRL does not authorize access to other types of personal data such as age and marital status because such information is exempt from mandatory disclosure by G.L. c. 4, §7, cls. 26.

II. IS INFORMATION COMPILED BY THE BOARDS OF REGISTRATION IN THE COURSE OF DISCIPLINARY PROCEEDINNGS AGAINST LICENSEES TO BE MADE AVAILABLE TO THE PUBLIC?

Your specific questions ask whether public access is to be allowed to the following kinds of information: (1) complaints filed against licensees; (2) information obtained through investigations relating to complaints; and (3) final dispositions of complaints. It is my opinion that all such information comes within the broad definition of "personal data" con-

tained in FIPA. c. 66, §1. Thus, disclosure of this information must be authorized by statute, or otherwise made in accordance with c. 66A, §2(c).

Treating first the issues presented by complaints and investigatory materials, I find no specific statutes expressly authorizing public access to such information. If public access to this information is authorized, it is by virtue of the PRL.

As noted earlier, the PRL declares all records received and maintained by the commonwealth to be public records, unless exempt under any of nine exemptions. c. 4, §7, cls. 26. See footnote 2 for text of exemptions. At least two exemptions are relevant: exemption (c), protecting personal privacy interests; and exemption (f), protecting certain investigatory material.

As discussed in Part I of this opinion, whether or not exemption (c) would protect complaints and investigatory files depends upon an examination of the facts and a balancing of the interests involved in an individual case. *Dennis-Yarmouth Regional School District* v. *Kelley, supra; Rural Housing Alliance, Inc.* v. *U.S. Department of Agriculture, supra.* There are at least two variables which could affect this determination in a particular instance: the nature of the charges made in the complaint, and whether other information relating to the charges is already on public record. *See generally* Note, Privacy of Information in Florida Public Employees' Personnel Files, 27 U. Fla. L. Rev. 481 (1975); Note, Application of the Constitutional Privacy Rights to Exclusions and Dismissals from Public Employment, 1973 Duke L. J. 1037 (1973). *See also* discussion in Part I of this opinion. Another exemption to the PRL which may apply in a particular case is exemption (f). This exemption protects certain investigatory materials "necessarily compiled out of the public view" the disclosure of which "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in public interest." The boards of registration are given statutory responsibility for investigating and hearing complaints against members of the regulated trades and professions.[6] In discharging this responsibility, they act as law enforcement or investigatory officials within the meaning of exemption (f). Therefore, to the extent that investigations are conducted in secrecy, and that disclosure of investigatory information would prejudice their efforts to enforce laws relating to the regulated trades and professions, it is my opinion that exemption (f) would apply. *See Bougas* v. *Chief of Police of Lexington,* 1976 Mass. Adv. Sh. 2236. (Police records containing reports of police officers and letters from citizens relating to a particular incident resulting in criminal proceedings exempt from disclosure under c. 4, §7. cls. 26(f)). *See also Exxon Corporation* v. *FTC,* 384 F.Supp. 755 (D.D.C.

[6]The following is a list of the statutes which authorize the various boards of registration to investigate complaints: Medicine, c. 112, §5; Podiatry, c. 112, §17A; Pharmacy, c. 112, §§27 and 32; Dental Examiners, c. 112, §43; Veterinarians, c. 112, §57; Architects, c. 112, §§60H and 60N; Optometry, c. 112, §71; Dispensing Opticians, c. 112, §73H; Nurses, c. 112, §77; Professional Engineers and Land Surveyors, c. 112, §81P; Embalmers and Funeral Directors, c. 112, §§88, 84A and 85; Barbers, c. 112, §§87L and 87M; Real Estate Brokers and Salesmen, c. 112, §87AAA; Chiropractors, c. 112, §115; No express statutory authority was found for Electricians.

1974) (Customer complaint letters relating to pending anti-trust complaint exempt from public disclosure as investigatory files).

It is impossible for me to make an abstract determination that all complaint and investigatory files are, or are not, within exemptions (c) and (f). The boards themselves must evaluate the information contained in these records and related circumstances in accordance with the principles set forth above to determine whether these exemptions apply to particular records. Any decision by a board denying access to such records is subject to review by the Supervisor of Public Records. G.L. c. 66, §10(b), as amended by St. 1976, c. 438. I note, however, that to the extent that disclosure of a complaint would jeopardize an individual's reputation, a valid claim for the application of exemption (c) may be stated. *See Bellotti* v. *Cramer, supra* at 10. (Disclosure of fact that individuals had submitted applications for new jobs may expose them to adverse public comment and could be an invasion of privacy). Also, if a board determines that a complaint or investigatory file is exempt under (c), it should consider deleting the personal identifying information and making an expurgated copy of the information available to the public. *See Department of the Air Force* v. *Rose, supra.* (Records of disciplinary action taken by Air Force Academy not exempt under privacy exemption to Federal Freedom of Information Act, where personal identifying information deleted). However, if it is determined that complaints and investigatory files do not fall within either exemption (c) or (f), or any other exemption, then they are public records, access to which is authorized by c. 66, §10(a).

Turning to complaints which have been disposed of, it is my opinion that such records do not fall within exemption (c), or any other exemption to the PRL. The comprehensive statutory scheme regulating certain trades and professions witnesses the strong public interest in the professional conduct of individual practicioners. The final disposition of a complaint concerning such conduct is the official act of a public agency charged with the responsibility to protect public health and safety. *See Fogland* v. *Board of Registration in Medicine, supra.* A licensee who is exonerated of charges contained in a complaint, or one who is found guilty of professional misconduct is not, in my opinion, entitled to prevail in the balancing of his or her personal interest in non-disclosure and the clear public interest in disclosure. "Where there is an important public interest in obtaining information, the private interest in protecting the disclosure must give way to the superior public interest, especially where the invasion is not substantial." *Campbell* v. *United States Civil Service Commission,* 539 F. 2d 48, 63 (10th Cir. 1976). See *Farrell* v. *Village Board of Trustees,* 83 Misc. 2d 124, 372 (N.Y.S. 2d. 905 1975) (reprimands given to police officers should be a matter of public records because the public interest outweighs any privacy claim). Therefore, I conclude that final dispositions of complaints are not subject to exemption (c). Since no other exemption appears relevant, I further conclude that public access to such information is authorized by G.L. c. 66, §10(a).

My answers to the questions raised in this section may be summarized

as follows. Complaints, investigatory materials and final dispositions of complaints are personal data, access to which is restricted by c. 66A, §2(c). The PRL authorizes access to complaints and investigatory material, unless such information falls within an exemption. The determination as to whether particular complaints or investigatory files are exempt, is to be made by the boards of registration with due regard to all circumstances and interests. Final dispositions of complaints, however, do not fall within any exemption to the PRL. Public access to such personal data is therefore authorized by c. 66, §10 (a).

III. IF PUBLIC ACCESS TO RECORDS OF THE BOARDS OF REGISTRATION IS AUTHORIZED, IN WHAT MANNER IS IT TO BE MADE?

Your specific questions appear to ask whether the various boards are required to prepare lists of information for distribution to the public, or whether they may simply permit interested persons to inspect records at their offices. Access to public records is governed by G.L. c. 66, §10(a). This statute provides as follows:

> Every person having custody of any public records, as defined in clause twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit them to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof on payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search.

Regulations adopted by the Supervisor of Public Records on January 14, 1977 establish the fees which may be charged for providing copies of public records. Reg. 2.5.

Neither c. 66, §10(a), nor its definitional counterpart c. 4, §7, cls. 26, contains any express requirement that agencies assemble or compile in one document all information in their possession which qualifies as a public record. Therefore, it is my opinion that the PRL does not require the boards of registration to prepare lists of public information, but only requires that they permit inspection and provide one copy of the public records in their possession. *See Nolan* v. *Rumsfeld,* 535 F. 2d 890, 891, (5th Cir. 1976) (Federal Freedom of Information Act compels disclosure only of existing records).

I note, however, that the statutes collected in footnote 2 expressly require the boards of registration to prepare lists or registers of certain information concerning licensees. As discussed in Part I of this opinion, such data are public records. The boards of registration may, as a matter of administrative convenience, include additional public information in these lists. However, at a minimum, the boards must prepare such lists as are required by statute and permit inspection of any additional public records in their possession.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 33. May 25, 1977

Amelia L. Miclette, *Chairperson*
Civil Service Commission
One Ashburton Place
Boston, Massachusetts 02108

Dear Ms. Miclette:

You have asked my opinion on the following questions:

1. Whether pending charges, specifications, or other information relating to a Civil Service Commission hearing held pursuant to G.L. c. 31 §43 and §46A must be made available to the public where the hearing is a private one;
2. Whether testimony and exhibits of a private hearing must be made available to the public after a hearing; and
3. If the answer to either of the first two questions is in the affirmative, whether the Commission may exercise its discretion to withhold highly sensitive and embarrassing material from the public.

To summarize, I am of the opinion that (1) pending charges, specifications, or other information relating to civil service hearings conducted under G.L. c. 31, §43 (or c. 31, §46A) are to be considered public records unless the Commission determines that the circumstances of an individual case render such disclosures "an invasion of personal privacy" within the scope of exemption (c) of G.L. c. 4 §7(26); (2) testimony and exhibits of a private hearing held under §43 must be made available to the public after a decision is rendered; and (3) the Commission has no discretion to withhold such material.

In responding to your first question, it is necessary to examine both G.L. c. 31 §43[1] which governs civil service disciplinary procedures and G.L. c. 4, §7(26), defining public records ("the public records law"). It is the interplay of these two statutes — and not whether a civil service hearing happens to be private or public — which will determine whether the pending charges, specifications or other information relating to a civil service hearing are public records and, therefore, subject to public inspection.[2]

General Laws, c. 31, §43 provides that persons holding office or employment under permanent appointment shall not be discharged, removed, suspended, transferred or lowered in rank without notice and a hearing. Specifically, the pertinent provisions of that section state:

> (a) . . . Before any action affecting employment or compensation . . . is taken, the officer or employee . . . shall be given a full hearing before the appointing authority . . . . [T]he appointing authority shall give to the employee affected a written notice of his decision.

[1]Hearings held under c. 31, §§43 and 46A are held pursuant to the hearings provisions of §43. Thus, for purposes of the questions you have raised, the two sections are indistinguishable.

[2]On the rights of a member of the public to inspect a "public record", *see* G.L. c. 4, §7(26), last paragraph, and G.L. c. 66, §10.

(b) If within ten days after receiving written notice of the decision of the appointing authority the person . . . shall so request in writing, he shall be given a hearing before a member of the commission . . . .

(c) Any hearing under this section shall, if either party concerned so requests in writing, be public . . . .

"Public records" are defined in G.L. c. 4, §7(26) as all papers and other documentary materials or data made or received by any officer or employee of any agency or commission unless the materials or data fall within one of the specific exemptions set forth in that section. Thus charges, specifications or other information regarding c. 31, §43 hearings constitute public records unless one of the exemptions in G.L. c. 4, §7(26) applies. With regard to the questions you have posed, two of these exemptions appear relevant.

First, exemption (a) removes from the definition of public records materials and data "specifically or by necessary implication exempted from disclosure by statute." In this regard, G.L. c. 31, §43(c) merits scrutiny because it provides that "any hearing under this section shall, if either party concerned so requests in writing, be public . . . ." If this section were interpreted to establish a presumption of private hearings, it could be argued that the Legislature intended specifications and other information regarding the hearing also to be private, and therefore exempt from the public records law.

Upon analysis, however, I find that §43(c) should be read to guarantee the affected employee a right to a public hearing[3] rather than to create a presumption of privacy. The statute mandates that the Commission hold a public hearing if either party so requests. It does not require the hearing to be closed absent such a request and, indeed, I am of the opinion that the Commission could on its own motion designate the hearing as public. *See Federal Communications Commission* v. *Schreiber,* 381 U.S. 279, 293 (1965) (F.C.C.'s rule prescribing open investigatory hearings upheld). Accordingly, I conclude that §43(c) does not specifically or implicitly remove the materials at issue from the public records law.

The second exemption from G.L. c. 4, §7 Clause 26 which I believe pertinent is exemption (c). This clause protects against disclosures of materials or data relating to a specifically named individual "that may constitute an invasion of personal privacy."[4]

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[3]The purpose of such a guarantee is to protect the participants from arbitrary action. *See Davis,* Administrative Law Treatise, §8.09 (1958; Supp. 1970; Supp. 1976).

In recent years, several courts have held that a public employee who has a statutory right to a hearing before he may be removed from his job for cause is constitutionally entitled under the due process clause to have that hearing be public. E.g., *Fitzgerald* v. *Hampton,* 467 F. 2d 755, 762-67 (D.C. Cir. 1972); *Adams* v. *Marshall,* 212 Kan. 595, 512 P. 2d 365, 371-72 (1973); *cf. Klein* v. *Board of Fire & Police Commissioners of the City of Pana,* 23 Ill. App. 3d 201, 318 N.E. 2d 726, 730-32 (1974). For a discussion of the principles underlying this due process right, *see In re Oliver,* 333 U.S. 257, 270, 273 (1948).

[4]*Cf.* 5 U.S.C. §552(b) (6) (1970), the similar but more restricted federal provision, which allows an exemption only where disclosure "would constitute a clearly unwarranted invasion of privacy."

One technique for protecting the privacy of the affected individual that has been approved by courts in the federal context is to delete any information identifying the individual and allow the remainder of the record to be released. *See Department of the Air Force* v. *Rose,* 96 S. Ct. 1592, 1608 (1976).

It is my opinion that a determination whether exemption (c) should apply to specifications, charges or other information pertaining to a pending §43 hearing will depend on the facts of the individual case, and will require a balancing of the interests involved. *See Rural Housing Alliance* v. *United States Department of Agriculture,* 498 F. 2d 73, 77-78 (D.C. Cir. 1974) (analogous federal exemption requires balancing of the individual's interest in privacy against the interest of the public in being informed). There are at least two variables which could affect this determination in a particular instance: the nature of the charges against the public employee; and whether other information relating to the charges is already on public record. *See generally* Note, Privacy of Information in Florida Public Employees' Personnel Files, 27 U. Fla. L. Rev. 481 (1975); Note, Application of the Constitutional Privacy Rights to Exclusions and Dismissals from Public Employment, 1973 Duke L. J. 1037 (1973). It is not the function of my office to give opinions on hypothetical questions. Thus, in the absence of a specific factual context, I must decline to comment further on the applicability of exemption (c) to §43 hearings. See IV Op. Atty. Gen. 425, 428 (1911); 1974-75 Op. Atty. Gen. No. 76. However, the Commission will want to consider each of these variables when making a disclosure decision in an individual case.

Turning to your second question, you have asked whether testimony and exhibits introduced at a private civil service hearing must be made available to the public after the hearing. General Laws c. 31, §29 provides that:

> [R]ecords of the proceedings of the commission and of the administrator shall be kept on file and shall be open to public inspection under the rules of the commission.[5]

The term "records of the proceedings of the Commission" in an adjudicatory context refers to the "entire proceedings" of a hearing in which a decision has been rendered,[6] G.L. c. 31, §45, and plainly includes the testimony and exhibits of the hearing. Thus, your second question raises the issue whether G.L. c. 31, §29 must be reconciled on a case-by-case basis with the personal privacy exemption in G.L. c. 4 §7(26) (c); or whether G.L. c. 31 §29 overrides G.L. c. 4 §7(26) (c) because of its specific requirements that these records be open to the public.

I have concluded that the language of G.L. c. 31, §29 is specific enough to override the general privacy provision of c. 4, §7(26) (c). *See, e.g., Pereira* v. *New England LNG Co., Inc.,* 364 Mass. 109, 118, 301 N.E. 2d 441, 447 (1973) ("if a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific"). This is true even if the hearing were a private one in which the facts of the case required that during the course of the hearing the pending charges remain private: while during the progress of such a hearing disclosure may con-

[5] Rule 16 of the Commission provides that "records of the proceedings of the Commission . . . which by statute are open to public inspection, shall be inspected only during regular working hours . . . ."

[6] To read §29 as necessarily including materials in an adjudicatory hearing prior to decision would conflict with the provisions of G.L. c. 31, §43(c), discussed *supra*, permitting private hearings. *See Brooks* v. *Fitchburg & Leominster St. Ry.* 200 Mass. 8, 17 (1908) (statutes, where possible should be construed in harmony with one another).

stitute an invasion of personal privacy (see my answer to your first question), once the hearing is completed and the charges have been sustained or rejected, the public's right to know as reflected in §29 overrides the privacy rights of the individual. Accordingly, it is my opinion that testimony and evidence of a closed hearing must be made available to the public after the decision is rendered.

As to your third question regarding the Commission's discretion to withhold highly sensitive and embarrassing material from the public, I am of the opinion that the pertinent statutes, G.L. c. 31, §29 and c. 66, §10, do not grant you any discretion to withhold public records. As quoted above, G.L. c. 31, §29 requires that "[r]ecords of the proceedings . . . shall be open to public inspection". G.L. c. 66, §10 requires that "[e]very person having custody of any public record . . . shall . . . permit them to be inspected by any person . . . ." Both statutes thus speak in mandatory terms and leave the Commission with no room for discretion. Given that the mandate to release the records is found not in the public record law but in G.L. c. 31, §29, the exemption in the Public Records Law for withholding matters which would constitute an invasion of personal privacy does not apply here. See discussion of §29 *supra* at p. 6. Thus, even information which would be private during the civil service hearing under the public records law becomes public once the decision is rendered.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 34. June 3, 1977

Gregory R. Anrig
Commissioner of Education
182 Tremont Street
Boston, Massachusetts 02111

Dear Commissioner Anrig:

You have requested my opinion as to whether the Pledge of Allegiance requirement (pledge) set forth in G.L. c. 71, §69, violates the First Amendment rights of teachers who object to leading and/or participating in recitation of the pledge.

General Laws c. 71, §69, provides in pertinent part that:

> Each teacher shall cause the pupils under his charge to salute the flag and recite in unison with him at said opening exercises at least once each week the Pledge of Allegiance.

The statute authorizes a fine of not more than $5.00 for each two-week period during which a teacher fails to comply with this section. You have informed me that a number of teachers in local school districts have refused, on First Amendment grounds, to comply with the statute, either because of religious objections or because they believe the phrase "with liberty and justice for all," which is part of the pledge, is untrue. Based

on the legal analysis which follows, it is my opinion that, with certain qualifications, a teacher's right to refuse to direct or participate in recitation of the pledge is constitutionally protected.

Although the United States Supreme Court has not specifically addressed this question, several Supreme Court decisions provide a pertinent framework for my analysis. First, in the leading case of *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1943), the Supreme Court has held that *students* cannot be compelled to recite the pledge. In *Barnette,* the Court held that such a requirement invades the individual's right to freedom of speech and belief.[1]

Although the Supreme Court has not directly addressed the question of whether *teachers* can be compelled to recite the pledge, the Court has indirectly extended the *Barnett* rationale from students to teachers. See *Baggett* v. *Bullitt,* 377 U.S. 360, 371 (1964). In *Baggett,* the court struck down a loyalty oath requirement for teachers, noting "the teacher who refused to salute the flag, or advocated refusal because of religious beliefs might well be accused of breaching his promise [in the oath]. Cf. *West Virginia Board of Education* v. *Barnette.*" The Court's citation of *Barnette* plainly indicates a congruence between students' and teachers' rights in this context.

Moreover, the Court has stated generally that First Amendment protections extend to teachers as well as students. See *Tinker* v. *Des Moines Community School District,* 393 U.S. 503 (1969). In that case, the Supreme Court addressed the extent to which expressions of opinion — there the wearing of black armbands to protest the war in Vietnam — were subject to regulation in the public school environment. The court stated that:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. 393 U.S. at 506.

In *Tinker,* the Court recognized the authority of states and school officials to prescribe and control conduct in the schools. However, the Court held that more than undifferentiated fear or apprehension of disturbance was necessary to overcome the right to freedom of expression. 393 U.S. at 508. Before such a prohibition on expression could be sustained, the Court held that there must be evidence that it is "necessary to avoid material and substantial interference with schoolwork or discipline." 393 U.S. at 511. Thus the silent, passive expression of opinion embodied by the wearing of armbands was found to be constitutionally protected.

Most recently, the Supreme Court reaffirmed the individual's first amendment right to refrain from compelled speech in *Wooley* v. *Maynard,*

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[1]Following the decision in *Barnette,* my predecessors on several occasions issued opinions finding that students may not constitutionally be compelled to salute the flag or recite the Pledge of Allegiance. See 1969-70 Op. Atty. Gen. 105; 1964-65 Op. Atty. Gen. 243; 1943-44 Op. Atty. Gen. 64. The *Barnette* decision effectively overruled earlier cases which upheld the section's constitutionality as to students. See *Johnson* v. *Town of Deerfield,* 25 F. Supp. 918 (D. Mass. 1939), aff'd. 306 U.S. 621; *Nicholls* v. *Mayor and School Committee of Lynn,* 297 Mass. 65 (1937).

45 U.S.L.W. 4379 (April 20, 1977). The Court upheld a judgment enjoining criminal prosecution of two New Hampshire residents who covered the state motto, "Live Free or Die," contained on their automobile license plates. The Court cited *Barnette, supra,* noting that "compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties" than the passive display of the state motto. *Id.* at 4382.

Furthermore, a number of lower courts have considered and upheld the teacher's right to refuse participation in the flag salute or Pledge of Allegiance. *Russo* v. *Central School District No. 1,* 469 F. 2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); *Hanover* v. *Northrup,* 325 F. Supp. 170 (D. Conn. 1970); *State* v. *Lundquist,* 262 Md. 534, 278 A. 2d 263 (1971). See *James* v. *Board of Education,* 461 F. 2d 566 (2d Cir.) cert. denied, 409 U.S. 1042 (1972). In each case, the teacher's activities were found to be constitutionally protected under the *Tinker* analysis.

In *Russo* and in *James,* the court did recognize an additional factor affecting the exercise of a teacher's right to freedom of expression — the possibility that the teacher's views, by virtue of his or her position of authority, might carry more influence with students than those of other students, and the school's legitimate interest in preventing a teacher from "arbitrarily inculat[ing] doctrinaire views in the minds of students." *James, supra,* 461 F. 2d at 573.

However, this additional interest was held of insufficient weight by itself to override a teacher's First Amendment rights. The state's heavy burden "in every first amendment case [is to show that] the regulatory policy is drawn as narrowly as possible to achieve the social interests that justify it." *Id.* at 574.

It is my opinion, therefore, that unless school authorities make a factual showing that a teacher's conduct (1) poses a danger of material and substantial disruption of schoolwork or discipline, or (2) constitutes an attempt to improperly propagandize the teacher's views, a teacher's refusal to participate in or lead the pledge of allegiance is constitutionally protected.

The Supreme Judicial Court recently reached a similar conclusion in an Advisory Opinion considering the constitutionality of a proposed amendment to G.L. c. 71, §69.[2] *Opinion of the Justices,* 1977 Mass. Adv. Sh. 1048. In its opinion, the Court stated that the present version of G.L. c. 71, §69 presented the same constitutional problems as did the proposed amendment.[3] The Court found that the reasoning of the Supreme Court

[2]The amendment, House Bill No. 5627, struck the fourth sentence of G.L. c. 71, §69, quoted above, and inserted in its place the following sentence:

> Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the "Pledge of Allegiance to the Flag."

After receiving the Opinion of the Justices, the Governor vetoed H. 5627. Thus the provisions of G.L. c. 71, §69 cited at the outset of this opinion remain in effect and your request has not been rendered moot.

[3]Although the Court found that the amendment might lessen the coercive aspects of the present statute, nonetheless, the majority found it to be unconstitutionally coercive. 1977 Mass. Adv. Sh. at 1056. The dissenters interpreted the amendment as providing for voluntary participation in the pledge of allegiance program. They agreed, however, with the majority's view that teachers could not constitutionally be required to participate in the pledge. 1977 Mass. Adv. Sh. at 1060.

in *West Virginia State Board of Education* v. *Barnette, supra,* applied to teachers as well, and that the proposed amendment would be unconstitutional if signed into law.

Accordingly, it is my opinion that insofar as c. 71, §69 categorically requires teacher participation, it is inconsistent with the First Amendment of the Constitution of the United States and may not be enforced.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 35. June 9, 1977

Mr. James W. Callanan
Executive Secretary
Board of Retirement
One Ashburton Place
Boston, MA 02108

Dear Mr. Callanan:

You have informed me that the Retirement Board (Board) has received an "application for insurance coverage as a deferred retiree" which was transmitted to you by the Group Insurance Commission. You have also indicated that the Board is required to certify the eligibility of individuals for deferred retirement as a condition precedent to the approval of such an application.[1] The application which occasioned your opinion request was submitted to the Commission by former State Senator Ronald C. McKenzie; you inform me that the Board has determined that Mr. McKenzie would ordinarily be eligible for deferred retirement status under G.L. c. 32, §10(2) (b 1/2).[2]

You ask, however, whether he is rendered ineligible by the application of G.L. c. 32, §10(2) (c), which states:

> Any member who is *removed or discharged* for violation of the laws, rules and regulations applicable to his office or position, or any member whose *removal or discharge* was brought about by collusion or conspiracy, shall not be entitled to the termination retirement allowance provided in this subdivision. (Emphasis added)

[1]Under the terms of G.L. c. 32A, §10, the deferred retirement plan works as follows. An insured employee who has a right to retire but whose retirement is deferred as provided in G.L. c. 32, §10, is entitled to continue (but pay for) his state insurance plans.

[2]This subsection was inserted by St. 1973, c. 928, §1. It provides, *inter alia:*

Any member classified in Group 1, Group 2, or Group 4, who has completed ten or more years of creditable service, and who, before attaining age fifty-five resigns or voluntarily terminates his service and leaves his accumulated total deductions in the annuity savings fund of the system of which he is a member, shall have the right upon attaining age fifty-five, or at any time thereafter, to apply for a termination retirement allowance to become effective as provided for in subdivision (3) of this section.

I have learned that former State Senator McKenzie is 43 years old, has completed eleven years of creditable service and that he resigned on March 31, 1977. Based on those facts, I concur in the Board's judgment that Mr. McKenzie would normally be eligible for deferred retirement under the above statute.

For reasons more fully set forth below, I am of the opinion that Mr. McKenzie is not disqualified by the operation of §10(2) (c), and, accordingly, the Board should certify his eligibility to the Group Insurance Commission.

I shall not recite the extended sequence of events leading up to the resignation of the applicant. These were matters widely reported in the media. He was indicted by a federal grand jury, convicted of a felony and sentenced to a federal penitentiary. The sentence imposed was stayed pending appeal and the applicant continued his service as a State Senator. However, on March 31, 1977, he resigned his office rather than face formal removal proceedings in the Senate. The question you pose, therefore, is whether ex-Senator McKenzie was constructively removed prior to his resignation or whether his resignation is the statutory equivalent of "removal or discharge". Under either circumstance, G.L. c. 32, §10(2) (c) would render him ineligible for deferred retirement benefits.

The argument that Mr. McKenzie was constructively removed from office is dependent on the application of G.L. c. 279, §30. That statute provides in essence that the office of one who has been convicted of a felony and sentenced to prison by a court of this state or of the United States, shall be vacated from the time of sentence. It is my judgment that this statute does not apply to a State Senator. It is overridden in this instance by the portion of the state constitution which states that "the Senate shall be the final judge of the elections, returns and qualifications of their own members." Mass. Const. Pt. 2, c. 1, §2, Art. 4. This affirmative grant of power includes the power of expulsion, *Hiss* v. *Bartlett,* 69 Mass. 468 (1855) and has been held to be "comprehensive, full and complete." *Dinan* v. *Swig,* 223 Mass. 516 (1916). *See, also, 6 Op. Atty. Gen.* 358 (1921). Those authorities mandate the conclusion that as a State Senator, Mr. McKenzie could be removed only by an affirmative act by the Senate, general statutes suggesting a different result nothwithstanding. His resignation effectively precluded removal by the Senate.

I also conclude that the term "removal or discharge" is not so broad that it sweeps within the ambit of G.L. c. 32, §10(2) (c), a resignation arguably tendered to forestall removal. It is a basic maxim of statutory construction that the words of a statute are to be read in accordance with their common and approved usage and are not to be stretched beyond their fair meaning in order to rationalize a particular result. *DesMarais* v. *Standard Accident Ins. Co.,* 331 Mass. 199 (1954). *See, generally, Prudential Ins. Co. of America* v. *City of Boston,* Mass. Adv. Sh. (1976) 182; *Board of Ed.* v. *Assessor of Worcester,* Mass. Adv. Sh. (1975) 2626.

The words "removal" and "discharge" connote an affirmative act by one's employer and have a common usage significantly different from the word "resignation", which implies an act by the employee. Indeed the difference between the terms is apparent in the terms of G.L. c. 32, §10, in which the words "removal or discharge" and "resigns" are repeatedly used to describe different situations. Since words used in different portions of a statute are ordinarily given the same meaning throughout, *Tracy* v. *Cambridge Jr. College,* 364 Mass. 367 (1973); *Randall's Case,* 331 Mass.

303 (1954), it would be an anomaly of statutory construction to extend the scope of G.L. c. 32, §10(2) (c) to include resignations as well as removals, when they are made distinct by the immediately preceding language of §10. Furthermore, a broad interpretation would be inconsistent with the proposition that statutes in derogation of private rights are to be strictly construed. *Commonwealth* v. *Beck,* 187 Mass. 15 (1904).

In arriving at this result I am not unmindful of the public policy underlying statutes like G.L. c. 32, §10(2) (c) which disqualify office holders who have committed unlawful acts from certain benefits. I note, however, that the existence of this apparent loophole, which permits resignation to prevent the consequences of removal, has previously been brought to the attention of the General Court, which has not amended the statute to embrace resignations after indictment or conviction. *See, Op. Atty. Gen.* 134 (1963). Whether the failure to amend was intentional or inadvertent, neither I nor the courts may presume to supply what the statute does not currently provide.

For the reasons stated, I believe that the term "removal or discharge" should not be expanded to include a resignation. I, therefore, conclude that former Senator McKenzie should be certified as eligible for deferred retirement and be deemed eligible for continued insurance coverage.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 36. June 10, 1977

John P. Larkin
Executive Secretary
Alcoholic Beverages Control Commission
Leverett Saltonstall Building
100 Cambridge Street
Boston, Massachusetts 02202

Dear Mr. Larkin:

You have requested my opinion on the meaning of "indebtedness" as that word is used in G.L. c. 138, §25.[1] Specifically, you seek a determination whether indebtedness under §25 should be read to include interest

[1]G.L. c. 138, §25, provides, in relevant part as follows:

It shall be unlawful for any licensee under this chapter to lend or borrow money, directly or indirectly, to or from any other licensee under this chapter. It shall be unlawful for any licensee under this chapter to receive or extend credit, directly or indirectly, for alcoholic beverages sold or delivered to any licensee engaged in the sale of alcoholic beverages except in the usual course of business and for a period of not more than 60 days. . . . [T]he credit shall be calculated from the date of the delivery of the alcoholic beverages to the purchaser to the date when the purchaser discharges in full the indebtedness for which the credit was extended. If any licensee does not discharge in full any such indebtedness within such 60 day period, the indebtedness shall be overdue and such licensee shall be delinquent within the meaning of this section. Within three days after a licensee becomes delinquent, the licensee who extended the credit shall mail a letter of notice by certified mail to the commission and a copy thereof to the delinquent licensee. The letter of notice shall be in forms provided by the commission. The notice shall contain the name of the delinquent licensee, the date of delivery of the alcoholic beverages and the amount of the indebtedness remaining undischarged. Within 5 days after receipt of such a letter of notice, the Commission shall post the name and address only of the delinquent licensee in a delinquent list containing the names and addresses of all delinquent licensees. Such postings shall constitute notice to all licensees of the delinquency of such licensee.

or finance charges incurred on a debt as well as the amount of the debt itself. For the reasons detailed below, it is my opinion that the term indebtedness in §25 does include interest and finance charges within its boundaries.

"Indebtedness" is not defined in G.L. c. 138, §25. In such a case the natural import of the word, according to the ordinary and approved usage of the language when applied to the subject matter of the act, is to be considered in determining the intention of the legislature. *Franki Foundation Co.* v. *State Tax Commission,* 361 Mass. 614, 617 (1971). See *The Prudential Insurance Company of America* v. *City of Boston,* Mass. Adv. Sh. (1976) 182, 188; *Mathewson* v. *Contributory Retirement Appeal Board,* 335 Mass. 610, 614 (1957); G.L. c. 4 §6, Third. Indebtedness is a derivative form of the word "debt", *see Black's Law Dictionary* (4th Rev. Ed.) p. 909, which is defined as "that which is due from one person to another whether money, goods, or services; that which one person is bound to pay or perform to another." *Garsson* v. *American Diesel Co.,* 310 Mass. 618, 622 (1942). Generally, the word "debt" is to be construed broadly rather than narrowly. *Id.* at 621.

Turning to the specific question which you raised, many authorities have held that a contractural obligation to pay interest gives rise to an indebtedness in the amount of that interest.[2] *See French* v. *Bates,* 149 Mass. 73, 79 (1889); *Gregory* v. *Jacobs,* 56 N.Y.S. 2d 574, 576, *aff'd.,* 269 App. Div. 921, 57 N.Y.S. 2d 538 (1945); *Heist* v. *Dunlop and Co.,* 193 Ga. 462, 18 S.E. 2d 837, 840 (1942). *See also,* 47 C.J.S., *Interest,* §70 at 75. Additionally, it has been held generally that a debt includes the cost of that debt. *See Heist* v. *Dunlop and Co., supra; Gregory* v. *Jacobs, supra; Gawne* v. *Casanova,* 86 Ohio App. 230, 90 N.E. 2d 444, 445 (1948).

The generally accepted meaning of the word "indebtedness" therefore suggests that, as used in G.L. c. 138, §25, the term should be construed to include interest and finance charges. To answer your question, however, it is essential to determine whether this interpretation is consistent with the legislative purpose of the statute. *Hamlen* v. *Welch,* 116 F. 2d 413, 417 (1st Cir. 1940); *Board of Education* v. *Assessors of Worcester,* Mass. Adv. Sh. (1975) 2626, 2629; *Franki Foundation Co.* v. *State Tax Commission, supra; Selectmen of Topsfield* v. *State Racing Commission,* 324 Mass. 309, 312-313 (1949).

In my judgment, construing "indebtedness" to include interest is consistent with the legislative purpose that prompted enactment of §25. The legislative history of G.L. c. 138, §25, reveals the General Court's desire to prevent the dominance of retail licensees by manufacturers or wholesalers, to the detriment of the public interest. 1967 H. Doc. No. 5303, Appendix D. *See* 1967 H. Doc. No. 4596, pp. 7-8; 1933 Sen. Doc. No. 494, p. 16. The General Court viewed the control of horizontal and

[2]Interest and finance charges are deemed indistinguishable by Courts. *See, e.g., Kriger* v. *European Health Spa, Inc. of Milwaukee, Wisconsin,* 363 F. Supp. 334, 336 (E.D. Wis. 1973); *Pacific Industries, Inc.* v. *Mountain Inn, Inc.,* 232 F. Supp. 801, 806 (W. D. Ark. 1964); *Friendly Finance Service, Mid City, Inc.* v. *Sanders,* 251 So. 2d 644, 648 (La. App. 1971).

vertical monopolization together with control of credit and advertising as the most important and effective means of serving the public interest concerning the sale of alcoholic beverages. *See* 1967 H. Doc. No. 5303, App. B, p. 11, App. D, p. 13. Moreover, the Supreme Judicial Court has affirmed the purpose, stating that §25 was designed to avoid "the evils believed to result from the control of retail liquor dealers by manufacturers, wholesalers, or importers through the power of credit." *James J. Sullivan, Inc.* v. *Cann's Cabins, Inc.,* 309 Mass. 519, 521 (1941).[3] *See also,* 17 A.L.R. 3d 396, 398.

This purpose would be frustrated if interest were exempted from the mandate of §25. Nothing in the statute prohibits a creditor licensee from charging interest or adding a finance charge to a loan; if these charges were not treated as part of the "indebtedness" governed by G.L. c. 138, §25, the retail licensee could come to owe the creditor unpaid interest or finance charges accumulated without any of the constraints imposed by §25. Under these circumstances the creditor would be able to exert the same control over the retail licensee which the General Court sought to eliminate by enacting G.L. c. 138, §25.

Additionally, it is important to note that there is no limit in c. 138, §25, as to the amount of indebtedness which one licensee can accumulate from credit extended by another licensee. Rather, the Legislature has attempted to control such indebtedness in other ways, such as limiting the period for payment to not more than sixty days, and requiring that the indebtedness be incurred in the usual course of business only for alcoholic beverages sold or delivered by one licensee to another.

When the Legislature has seen fit to exempt a licensee from the effect of c. 138, §25, it has done so by specific statutory language. *See, e.g.,* St. 1968, c. 574, §2; St. 1970, c. 768, §1; St. 1974, c. 279, §2. Thus, one must presume that if the Legislature had wanted to limit the definition of "indebtedness" to principal and exclude any interest or finance charges, it would have done so by specific statutory language.

It is well-settled that a construction of a statute that would thwart its objective is to be avoided. See *Commonwealth* v. *Lamb,* 365 Mass. 265 (1974); *Selectmen of Topsfield* v. *State Racing Commission, supra* at 314. Accordingly, I am of the opinion that the word "indebtedness" found in c. 138, §25, does include interest or finance charges.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[3]G.L. c. 138, §25, has been amended several times since 1941. *See* St. 1968, c. 574; St. 1970, c. 768, §§1-3; St. 1974, c. 279, §2; St. 1974, c. 813. St. 1968, c. 574, rewrote the section and greatly expanded its provisions. It did not, however, alter the purpose of the section as expressed by the Court in *James J. Sullivan, Inc.* v. *Cann's Cabins, Inc., supra.*

Number 37. June 28, 1977

The Honorable James A. Kelly, Jr.
Chairman
Senate Ways and Means Committee
State House, Room 332
Boston, MA 02133

Dear Senator Kelly:

In accordance with the provisions of G.L. c. 12, §9, I hereby provide you, in your capacity as Chairman of the Senate Ways and Means Committee, with my opinion on two questions of law arising under a bill currently pending before your Committee. That bill, Senate No. 819, would amend G.L. c. 40 by adding a new Section 8H which would provide, *inter alia:*

> A city ordinance or a town by-law may establish a growth policy committee which shall have as its purpose the initiation or continuation of a locally-oriented participatory planning process to enable representatives from various interest groups in the municipality to evaluate the effects of growth and development patterns on the community, to formulate future growth and development goals which meet the needs of the diversity of residents in the community, to coordinate local growth and development goals with the goals of neighboring municipalities and with regional needs, and to contribute to the formulation of state growth and development policies and objectives.[1]

The apparent intent of the pending legislation is to authorize the continuation of local growth policy committees, which were established in the several communities of the Commonwealth as a result of the Massachusettts Growth Policy Development Act, St. 1975 c. 807. The impetus for the legislation is provided by the fact that St. 1975, c. 807 is a temporary act which will expire, by its own terms, on July 1, 1977.

The Ways and Means Committee has asked me whether legislation such as Senate No. 819 is necessary to authorize the continuation of these growth policy committees and, if not, what portion of the so-called "Home Rule Amendment" permits their continuation. For reasons more fully set forth below, I believe that the legislation is not necessary because, under Section 6 of the Home Rule Amendment, municipalities already possess the discretionary authority to continue local growth policy committees. Mass. Const. Amend. Art. II, §6 as amended by Mass. Const. Amend. Art. LXXXIX.

The Home Rule Amendment was intended to grant to the cities and towns of the Commonwealth "independent municipal powers which they did not previously inherently possess." *Board of Appeals of Hanover* v.

[1]The bill also provides for the composition and selection of members of a growth policy committee; authorizes the committee to conduct public hearings, to receive public and private funds, and to request information from other public agencies; and requires it to submit an annual report to its municipality, its regional planning agency, and the office of State Planning.

Housing Appeals Committee in the Department of Community Affairs, 363 Mass. 339, 358 (1973); *Town of Arlington* v. *Board of Conciliation and Arbitration,* Mass. Adv. Sh. (1976), 2035, 2039. Section 1 of the Amendment states that it is "the intention of this article . . . to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article."[2] Section 6 of the Amendment defines the Constitutional grant of powers to every city and town, as follows:

> *Any city or town may,* by the adoption, amendment, or repeal of local ordinances or by-laws, *exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight,* and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three. (emphasis added)

This section "establishes a broad general grant to home rule to cities and towns." *Board of Appeals of Hanover* v. *Housing Appeals Committee in the Department of Community Affairs, supra,* 357-358; See also, *Town of Arlington* v. *Board of Conciliation and Arbitration, supra,* 2039. It is my belief that this affirmative grant of power is broad enough to authorize the creation or continuation of planning bodies like the local growth policy committees contemplated by your request.[3] Under the terms of the Amendment, however, the broad powers may only be exercised if the municipal ordinances or by-laws enacted under its aegis are consistent with the Constitution or General Laws of the Commonwealth. Thus my analysis would be incomplete without exploring the possibility that the continuation of those bodies might be inconsistent with state law.

In determining whether the local rule is "not inconsistent" with the pre-existing organic law of the Commonwealth, I have examined the relevant provisions of law and attempted to determine whether there is a legislative intent to preclude local action. *Bloom* v. *City of Worcester,* 363 Mass. 136, 156 (1973). *See, also, Town of Milton* v. *Attorney General,* Mass. Adv. Sh. (1977) 1214, 1217. I conclude not only that there is no evidence of a legislative intent to preempt the field, but that the relevant law actually confers pertinent regulatory authority on the cities and towns and encourages municipal planning. The clearest manifestation of this fact is the text of Mass. Const. Amend. Art. LXXXVIII, adopted by the voters of the Commonwealth on the same day as the Home Rule Amendment itself. Article LXXXVIII provides explicitly that:

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[2]For such standards and requirements, see Home Rule Procedures Act, G.L. c. 43B.

[3]Certain exceptions, which are not relevant here, to the broad grant of powers in §6 are specified in §7 of art. 89.

> "[t]he industrial development of cities and towns is a public function and the commonwealth and the cities and towns therein may provide for the same in such manner as the general court may determine."

I also believe that municipal ordinances which continue the growth committees are "consistent," in the dictionary sense, with the provisions of St. 1975, c. 807.[4] The predominant purpose of the Massachusetts Growth Policy Development Act is to achieve "coordinated and well-planned growth and development decisions in the Commonwealth." St. 1975, c. 807, §1. Continuing these committees reinforces rather than conflicts with this legislatively articulated purpose. In addition, any city or town has the authority to appropriate funds for the operation of such a committee, by §6 of the Amendment. See also G.L. c. 40, §5.[5]

Therefore, legislation such as proposed Senate 819 is not necessary to authorize cities and towns to establish or continue local growth policy committees and to appropriate funds, if necessary, for their operation.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 38. June 29, 1977

Charles J. Doherty, *Director*
Office of Campaign and Political Finance
8 Beacon Street
Boston, Massachusetts 02108

Dear Mr. Doherty:

As Director of the Office of Campaign and Political Finance you have requested an opinion of the Attorney General regarding your duties and responsibilities under sections 13-17 of Chapter 55 of the General Laws.[1] Specifically, you wish to be advised as to whether you have the authority to investigate alleged violations of sections 13-17, by virtue of your power under G.L. c. 55, §3 to:

> . . . investigate the legality, validity, completeness and accuracy of all reports and actions required to be filed and taken by candidates, treasurers, political committees and any other persons pursuant to [chapter 55] and any other laws of the commonwealth pertaining to campaign contributions and expenditures.

The fact that the general court has in St. 1975, c. 807 mandated establishment of these committees in the several communities of the state in no way detracts from the conclusion that the municipalities already possess authority to continue the committees. While the legislature has previously exercised the power to enact a general law under the powers retained to it by Section 8 of the Home Rule Amendment, that temporary exercise of power does not require all future planning decisions to be made by general legislation.

G.L. c. 40, §5, provides in pertinent part:
A town may . . . appropriate money for the exercise of any of its corporate powers, including the following purposes: . . . for all other necessary charges arising in such town.
By G.L. c. 40, §1, the foregoing provision applies to a city, and by G.L. c. 39, §1, a city council has the power of a town.

Sections 13-17, which are discussed at p. 2, *infra*, proscribe certain practices in the solicitation and receipt of campaign funds.

For the reasons set forth below, it is my opinion that the powers conferred on you by that section do not authorize you to investigate alleged violations of G.L. c. 55, §§13-17. It is a long standing canon of statutory construction that where the language of a statute is plain, it must be interpreted in accordance with the usual or natural meaning of the words. *Gurley* v. *Commonwealth,* 363 Mass. 595 (1973). Similarly, reason and common sense are not to be abandoned by the court in interpreting a statute, since it is to be supposed that the legislature intended to act in accordance with them. *Van Dresser* v. *Firlings,* 305 Mass. 51 (1940). The language of G.L. c. 55, §3 is clear and unambiguous. It literally applies only where reports must be filed[2] or actions taken[3] as a result of requirements imposed by campaign financing statutes. Rather than mandatory filing or specific affirmative actions, G.L. c. 55, §§13-17 are prohibitory in nature; they proscribe certain practices in the solicitation and receipt of campaign funds. Section 13 prohibits state, county and municipal employees from soliciting campaign contributions. Section 14 prohibits the solicitation of contributions on the premises of any building occupied for state, county or municipal purposes. Section 15 prohibits certain political contributions by public employees. Sections 16 and 17 prohibit penalizing public employees for refusing to make political contributions and prohibit rewarding public employees for making contributions to a political campaign. Since G.L. c. 55, §§13-17 impose neither reporting requirements nor the taking of specific actions, your Section 3 powers do not appear broad enough to reach alleged violations of those statutes.

There is, of course, a narrow class of cases in which the plain meaning of a statute must be supplemented by the legislative history of that statute. *Board of Education* v. *Assessor of Worcester,* Mass. Adv. Sh. (1975) 2626. Here, however, there is nothing in the recent legislative history of Chapter 55 to suggest a broader reading of Section 3. The office you now hold was first created by St. 1973, c. 1173 and its powers received extensive consideration in succeeding years. St. 1974, c. 859; St. 1975, c. 151. The thrust of each of these statutes was to redraft Chapter 55 to impose ceilings on campaign contributions and filing requirements to assure compliance. But while Chapter 55 has been through three complete revisions since 1973, none of these revisions has resulted in any substantive[4] changes in Sections 13-17. If the Legislature had intended any major changes in

[2]A number of sections of Chapter 55 contain explicit reporting requirements. See, e.g., G.L. c. 55, §§18, 20, 21 and 22.

[3]Chapter 55 requires affirmative acts in several instances. For example, a candidate for certain state and county offices and the treasurer of a committee organized on behalf of such a candidate must designate a national bank, authorized to transact business in this state, or a trust company organized and existing under the laws of this Commonwealth, as a depository for campaign funds. A certificate of appointment of the depository must be filed with the Director within three business days following the designation. Further, these candidates and treasurers must deposit all contributions within three days of receipt in the form received. G.L. c. 55, §19.

[4]The sections were renumbered and penalty provisions altered by the revisions.

the enforcement of these long standing statutes, it would have provided some signal of its intent.[5]

Finally, the result worked by this interpretation of the statute is consistent with what I perceive to be the overall purpose and plan of Chapter 55. The statutory scheme contemplates that the Director function primarily as a record keeper and not as an enforcement officer.[6] There is nothing inherent in your record keeping function which suggests that you should be the investigating official. In fact, violations of sections 13-17 would not be discernible from the reports filed with you, since those reports reveal neither the employment background of a contributor, the identity of the person soliciting the contribution. nor the nature or location of the solicitation.

For these reasons I conclude that G.L. c. 55, §3, does not vest you with power to investigate alleged violations of sections 13-17; enforcement of these sections is committed to this office, the District Attorneys and the police. If information regarding violations of these sections comes to your attention, you should make this information available to the appropriate law enforcement agency. As these are criminal matters they may, in the first instance, be referred to the District Attorney of the area where the violation occurred.,

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

Number 39. June 30, 1977

The Honorable Robert Q. Crane
Treasurer & Receiver General
State House, Room 227
Boston, Massachusetts 02133

Dear Treasurer Crane:

You have requested my opinion in regard to the following question of law:

> In light of §§19 and 92 of M.G.L. c. 32, is the Board of Retirement of the Treasury Department of the Commonwealth of Massachusetts authorized to honor the Notice of Levy of June 16, 1976, issued by the Internal Revenue Service of the U.S. Department of the Treasury upon the retirement allowance of Margaret H. Burke, a retired member of the state employees' retirement system?

For the reasons set forth below, I answer your question in the affirmative.

[5]There is an additional reason for a literal interpretation of the Director's investigatory authority. That authority carries with it the express power to subpoena witnesses and compel testimony under oath. Because administrative officers and agencies have no inherent power to compel the attendance and testimony of witnesses that power should be grounded only upon explicit statutory authorization. 1 AM JUR 2d Administrative Law §§89, 91. It should not be extended by implication. *See Cabot* v. *Corcoran*, 332 Mass. 44, 46-48 (1955); *Op. Atty. Gen.*, Nov. 28, 1938, p. 122.

[6]Efforts to create a special prosecutor have been repeatedly rejected by the Legislature, which has directed instead that prosecutions be handled by existing law enforcement officials. (1975 H5323, 1976 H3383, 1977 H3405). Even Section 3 itself contains a directive that evidence of violations of law be turned over to law enforcement officials.

Before considering the impact of G.L. c. 32, §§19 and 92, it is necessary to determine whether the levy provisions of the Internal Revenue Code apply to the retirement allowance established by G.L. c. 32, §§1 *et seq.* Where a person has failed to pay a federal tax, §6331 of the Internal Revenue Code of 1954, 26 U.S.C. §6331 (hereinafter §6331), authorizes the Internal Revenue Service to collect the tax by a levy upon all property or rights to property belonging to the delinquent taxpayer.[1] The Internal Revenue Service has by regulation taken the general position that:

> No provision of a State law may exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes. Treas. Reg. 301.6334-1 (c).

Moreover, the Service has specifically interpreted §6331 to authorize it to levy upon the accrued compensation of state employees. Treas. Reg. §301.633-1(a) (4) (ii).[2]

It has also taken the position that amounts owed by state governments and their agencies or instrumentalities as pensions to former employees are subject to levy for the satisfaction of unpaid federal taxes. Rev. Rul. 55-227, 1955-1 C.B. 551. Given the nature of the "retirement allowance" established by G.L. c. 32, §§1 *et seq.*,[3] I conclude that §6331 does apply in the situation you have outlined.

I now turn to your specific question whether G.L. c. 32, §§19 and 92, affect the authority of the Board of Retirement (hereinafter the Board) to honor the notice of levy issued by the Internal Revenue Service. As a preliminary matter, §92 is not relevant to the subject of your inquiry. That section renders void only voluntary transfers of a retirement allowance. Section 6331, however, empowers the Internal Revenue Service to collect the unpaid tax through the power of distraint and seizure without the assent of the taxpayer. On its face, §92 does not apply to such involuntary seizures of a retirement allowance.

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[1]§6331 states in pertinent part that:

> (a) AUTHORITY OF SECRETARY. — If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property (except as is exempt under §6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax . . . .
> (b) SEIZURE AND SALE OF PROPERTY. — The term "levy" as used in this title includes the power of distraint and seizure by any means . . . .

The exceptions contained in §6334 are not relevant to your question.

[2]This regulation provides that:

> Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or a Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax. This regulation was upheld by the United States Suprme Court in *Sims* v. *United States,* 359 U.S. 108, 110-113 (1957).

[3]General Laws, c. 32, §1, defines a retirement allowance as the sum of the annuity and the pension provided by the state employees' retirement system. The terms annuity and pension are themselves defined by the statute: an "annuity" consists of payments derived from the accumulated deductions from the former state employee's regular compensation; a "pension" consists of the payments derived from any contributions made by the appropriate governmental unit.

Section 19 of c. 32 does, on the other hand, explicitly apply to involuntary transfers. That section provides in pertinent part that:

> The rights of a member to an annuity, pension or retirement allowance, [and] such annuity, pension or retirement allowance itself . . . shall not be attached or taken upon execution or other process.

The language of §19 evinces a legislative intent to exempt a retirement allowance from seizure by any means, including levy under §6331. Thus, G.L. c. 32, §19 is in direct conflict with the federal statute.

Where a state statute directly conflicts with a validly enacted federal law, the Supremacy Clause of the United States Constitution provides that the federal statute is controlling. For a recent discussion of this constitutional principle, I refer you to *Perez* v. *Campbell,* 402 U.S. 637, 649-652 (1971).

Section 6331 is a valid federal statute, *Sims* v. *United States,* 359 U.S. 108 (1959). The courts have, moreover, consistently upheld the Internal Revenue Service's position that a state cannot exempt the property of a delinquent taxpayer from execution or attachment for the collection of federal taxes.[4] Further, I note that the Board was the proper party under 26 U.S.C. §6332, on which to serve the notice of levy because the Board is obligated by statute to provide for payment of retirement allowances under the state employees' retirement system. G.L. c. 32, §§20(1) (b), 20(5) (b). Should the Board fail to surrender the amount called for in the notice of levy, the Board's members as well as the Commonwealth would become liable under 26 U.S.C. §6332(c) in that amount to the United States.[5]

For the foregoing reasons, I conclude that the Board of Retirement of the Commonwealth's Treasury Department is constitutionally required to honor the notice of levy of June 16, 1976, issued to it by the Internal Revenue Service in relation to the retirement allowance of Margaret H. Burke.

Very truly yours,
FRANCIS X. BELLOTTI
Attorney General

[4]*Herndon* v. *United States,* 501 F. 2d 1219, 1222-23 (8th Cir. 1974); *United States* v. *Newhard,* 128 F. Supp. 805, 810 (W.D. Pa. 1955); *Kieferdorf* v. *Commissioner,* 142 F. 2d 723, 725 (9th Cir.), *cert. denied,* 323 U.S. 733 (1944).

[5]*Sims* v. *United States,* 359 U.S. 108, 113-14 (1959); *Commonwealth of Massachusetts* v. *United States,* 296 F. 2d 336, 337 (1st Cir. 1961).

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